Supreme Court, U.S.
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In The

Supreme Court of the United States

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H. RAY LAHR,

Petitioner,

v.

NATIONAL TRANSPORTATION
SAFETY BOARD, ET AL.,

Respondents.

◆

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

◆

PETITION FOR A WRIT OF CERTIORARI

◆

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QUESTIONS PRESENTED

1.

Where the government does not dispute that it misrepresented eyewitness accounts to a tragedy, does a prohibition on disclosure of the identities of the witnesses on privacy grounds result in a blanket rule of non-disclosure not contemplated under the Freedom of Information Act?

2.

Is the district court's inquiry into the deliberative process privilege under the Freedom of Information Act limited to adjudication of whether the privilege is properly asserted, and does this limited review erroneously transform a qualified privilege into an absolute one?

RULE 14.1(b) STATEMENT

A list of all parties to the proceeding in the court whose judgment is the subject of the petition is:

Petitioner: H. Ray Lahr.

Respondents: National Transportation Safety Board, Central Intelligence Agency, National Security Agency.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

RULE 14.1(b) STATEMENT ii

TABLE OF CONTENTS iii

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

- A. The Flight 800 Tragedy 3
- B. The District Court Opinion 6
- C. The Court of Appeals Decision 12

REASONS FOR GRANTING THE PETITION 14

- A. Where it is undisputed that the government misrepresented eyewitness accounts of a crime, prohibiting disclosure of the identities of these witnesses results in a blanket rule of non-disclosure not contemplated under the FOIA 14
- B. The district court's inquiry into the deliberative process privilege under the FOIA should not be limited to adjudication of whether the privilege is properly asserted, as such an analysis erroneously transforms the qualified privilege into an absolute one 28

CONCLUSION 38

TABLE OF CONTENTS – Continued

Page

APPENDIX

APPENDIX A (Opinion of the U.S. Court of Appeals for the Ninth Circuit, filed June 22, 2009) .... App. 1

APPENDIX B (Order of the U.S. District Court for the Central District of California, filed August 31, 2006) .... App. 52

APPENDIX C (Order of the U.S. District Court for the Central District of California, filed October 4, 2006) .... App. 126

APPENDIX D (Order of the U.S. District Court for the Central District of California, filed March 19, 2007) .... App. 185

APPENDIX E (Order denying Petition For Rehearing *en banc* U.S. Court of Appeals for the Ninth Circuit, filed Jan. 21, 2010) .... App. 199

APPENDIX F (Lahr Excerpts of Record U.S. Court of Appeals for the Ninth Circuit)

Graphic reprinted from March 10, 1997 Press Enterprise Newspaper article, *New Data Show Missile May Have Nailed* TWA *800, Debris Pattern Provides Key to Mystery* .... App. 202

November 17, 1997 CIA Animation, "What Did The Eyewitnesses See?" four screen shots

0:33 .... App. 203

2:10 .... App. 204

TABLE OF CONTENTS – Continued

Page

7:02 .... App. 205

9:02 .... App. 206

Wash. Times advertisement, August 15, 2000 .... App. 207

TABLE OF AUTHORITIES

Page

CASES

Department of Air Force v. Rose, 425 U.S. 352 (1976).....22, 26, 32, 33, 34

Forest Service Employees for Environmental Ethics v. U.S. Forest Service, 524 F.3d 1021 (9th Cir. 2008).....12, 21, 22

General Services Administration v. Benson, 415 F.2d 878 (9th Cir. 1969).....13

Hickman v. Taylor, 329 U.S. 495 (1947).....32

In re Sealed Case, 121 F.3d 729 (D.C. Cir. 1997).....36

John Doe Agency v. John Doe Corp., 493 U.S. 146 (1989), *reh'g denied*, 493 U.S. 1064 (1990).....32

John Hancock Mut. Ins. Co. v. Harris Trust & Savings Bank, 114 S. Ct. 517 (1993).....33

Lion Raisins Inc. v. United States Dep't of Agriculture, 354 F.3d 1072 (9th Cir. 2004).....33

Maricopa Audubon Soc'y v. U.S. Forest Serv., 108 F.3d 1082 (9th Cir. 1997).....13

Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157 (2004).....9, 10

NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214 (1978).....25, 33

NLRB v. Sears, 421 U.S. 132 (1975).....28, 29, 36

Painting Indus. of Haw. Mkt. Recovery Fund v. U.S. Dep't of Air Force, 26 F.3d 1479 (9th Cir. 1994).....23

TABLE OF AUTHORITIES – Continued

Page

Stern v. F.B.I., 737 F.2d 84 (D.C. Cir. 1984)..............25

United States Dep't of Defense v. Fed. Labor Relations Auth., 510 U.S. 487 (1994).......9, 23, 24, 26, 30

United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 775............30, 33

United States Dep't of State v. Ray, 502 U.S. 164 (1991)..24, 25

United States v. Weber Aircraft Corp., 465 U.S. 792 (1984)...28

STATUTES

5 U.S.C. § 552 2

5 U.S.C. § 552(a)(4)(B)..7

5 U.S.C. § 552(b)(1)-(9), 552(d)................................32

5 U.S.C. § 552(b)(7)(C)..23

5 U.S.C. § 552(b)(5)..28

28 U.S.C. § 1254(1) 2

49 U.S.C. § 1131(a)(2)..16

49 U.S.C. § 1131(a)(2)(B)...16

FEDERAL REGULATIONS

49 C.F.R. Part 831.5 16

RULES

Fed. R. Civ. P. 56(e)..9

Page

LEGAL ENCYCLOPEDIAS

McCormick Evid. § 108 (6th Ed.) 31

Wright and Graham, Fed. Prac. & Pro. 31

LEGISLATIVE HISTORY

Freedom of Information Act Amendments Sourcebook, House Government Operations Committee and Senate Judiciary Committee, 94th Cong., 1st Sess., 1975 31

H.R. Rep. No. 1497 29

PERIODICALS

Wash. Times, *We Saw TWA Flight 800 Shot Down By Missiles And We Won't Be Silenced Any Longer*, Advertisement, Aug. 15, 2000 18

Press Enterprise Newspaper, *New Data Show Missile May Have Nailed TWA 800, Debris Pattern Provides Key to Mystery*, March 10, 1997 .... 4, 18

Corporate Legal Times, *The Chosen One*, Oct. 2004, R. Vosper 18

EXECUTIVE BRANCH MEMORANDA

Memorandum for the Heads of Executive Departments and Agencies, Pres. Obama, Jan. 21, 2009 31

Page

Freedom of Information Act Memorandum, Attorney General Holder, March 19, 2009 32

BOOKS

First Strike, J. Cashill & J. Sanders, WND Books 2003, Chap. 9, *The Big Lie*, at 155 26

OTHER REFERENCE

Airman's Information Manual 3

CIA-produced video entitled, *What Did The Eyewitnesses See* 5, 15, 16

PETITION FOR A WRIT OF CERTIORARI

H. Ray Lahr respectfully petitions for a writ of certiorari to review the opinion and judgment of the U.S. Court of Appeals for the Ninth Circuit.

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OPINIONS BELOW

The panel opinion of the U.S. Court of Appeals for the Ninth Circuit, dated June 22, 2009, is officially reported at 569 F.3d 964 (9th Cir. 2009), and is reproduced in Appendix A at 1-51.

The opinion and order of the U.S. District Court for the Central District of California, dated July 31, 2006, is officially reported at 453 F. Supp. 2d 153 (C.D. CA 2006) and is reproduced in Appendix B at 52-125.

The subsequent opinion and order of the U.S. District Court for the Central District of California, dated October 4, 2006, is officially reported at 2006 WL 2854314 (C.D. Cal. Oct. 4, 2006), and is reproduced in Appendix C at 126-184.

The fees opinion and order of the U.S. District Court for the Central District of California, dated March 19, 2007, is not publicly reported, and is reproduced in Appendix D at 185-198.

The opinion of the U.S. Court of Appeals for the Ninth Circuit, denying *en banc* review, dated January

21, 2010, is not publicly reported, and is reproduced in Appendix E at 199-201.

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JURISDICTION

The judgment of the U.S. Court of Appeals for the Ninth Circuit was entered on August 8, 2009. A timely petition for rehearing *en banc* was filed on July 20, 2009, and was denied on January 21, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).

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STATUTORY PROVISIONS INVOLVED

The Freedom of Information Act, 5 U.S.C. § 552 provides, in relevant part:

> (a) Each agency shall make available to the public information as follows:
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> * * *
>
> (3)(A) * * * [E]ach agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.
>
> (b) This section does not apply to matters that are –
>
> * * *

> (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.
>
> * * *
>
> (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
>
> (7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy

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STATEMENT OF THE CASE

A. The Flight 800 Tragedy

On July 17, 1996, the military issued a warning that it was dangerous for civilian aircraft to fly below 10,000 feet in Military Operating Zone[1] Whisky 105 ("W-105"), whose western edge was about 15 miles off Long Island's coast. At 8:00 p.m., the military was conducting classified military maneuvers.[2] The district court:

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[1] Defined in *Airman's Information Manual* § 3:43: "[Warning zones] denote the existence of unusual, often invisible, hazards to aircraft, such as artillery firing, aerial gunnery, or guided missiles."

> The genesis of this suit lies in the tragic crash of Trans World Airline ("TWA") Flight 800 ("Flight 800"). On July 17, 1996, Flight 800 departed from John F. Kennedy International Airport in New York City, en route to Charles de Gaulle International Airport in Paris, France. The aircraft crashed into the Atlantic Ocean twelve minutes after departure. There were no survivors of the accident and the aircraft, a Boeing 747-131, was destroyed.

App. B at 55.

The tragedy unfolded at sunset, on a relatively cool, sunny day, ten miles off the coast of Long Island's south shore, a popular, affluent, summer resort. Without a word of warning from the cockpit, the plane exploded in view of as many as a thousand people up and down the coast – vacationers, surfers, fishermen, beach walkers, helicopter pilots, and other airline pilots. The multiple explosions were seen from "over 40 miles away."[3] The plane fell from the sky in flames, the cockpit broken off from the fuselage, tragically killing 230 people, thirty-eight of whom were under the age of 18. Almost seven hundred people would provide the FBI with formal witness statements as to what they had seen of the disaster.[4]

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[2] *See* graphic reprinted from March 10, 1997 Press Enterprise Newspaper article, *New Data Show Missile May Have Nailed TWA 800, Debris Pattern Provides Key to Mystery* App. F at 202.

[3] Quoting Nov. 17, 1997 CIA animation at 10:40, discussed *infra*.

Seventeen months into the NTSB's four-year probe, on November 17, 1997, the three major networks broadcast excerpts of the CIA-produced video entitled, *What Did The Eyewitnesses See,*[5] and CNN broadcast the 14-minute video in its entirety.[6]

The video climaxed with an animation purporting to show what the eyewitnesses did see. As presented in the CIA video, the nose of the aircraft blew off from an internal explosion, and then the nose-less 747 "pitched up abruptly and climbed several thousand feet from its last recorded altitude of about 13,800 feet to a maximum altitude of about 17,000 feet." Trailing flames, this vertically zooming noseless aircraft allegedly deceived the eyewitnesses into thinking they had seen a missile. Neither the government nor the media ever showed the animation again.

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[4] The record in the case includes 673 FBI 302 eyewitness interview reports.

[5] Video lodged in Cross-Appellant H. Ray Lahr's Excerpts of Record ("Lahr's Excerpts").

[6] *See* App. F at 203-06, four screen shots of CIA animation: (1) "What Did The Eyewitnesses See;" (2) "The Eyewitnesses Did Not See A Missile;" (3) "Not A Missile;" and (4) Quoting narrator, "Just after the aircraft exploded, it pitched up abruptly and climbed several thousand feet from its last recorded altitude of about 13,800 feet to a maximum altitude of about 17,000 feet."

Like tens of millions of other Americans, "[Ray] Lahr, a former Navy pilot and retired United Airlines Captain who has served as ALPA's Southern California safety representative for over fifteen years" (App. B at 67), saw the now notorious CIA animation, depicting the transformation of a nose-less jumbo jet into a soaring rocket. This animation instantly discredited all eyewitness testimony and ended any real investigation into the plane's destruction, and transformed the Flight 800 tragedy into the most controversial disaster in aviation history. It remains so today.

B. The District Court Opinion

The district court wrote that Flight 800 raises "much-debated questions" (App. B at 53) and that "the crash of Flight 800 and the government's investigation and findings are matters of great public interest." App. B at 102. The court elaborated in its fee order:

> Plaintiff provides ample evidence of the public's interest in the information obtained in this case. According to Plaintiff, TWA Flight 800 has already been the subject of nine books and over 2,000 newspaper articles. A Google search yields over 147,000 webpage hits. Plaintiff adds that well-qualified experts will analyze the disclosures and several will publish reports of their findings on the websites of Flight 800 Independent Researcher's Organization (at flight800.org)

> and the Association of Retired Airline Professionals (at www.twa800.com). At least two magazines have already published articles about this Court's ruling.

App. D at 189.

Lahr's Freedom of Information Act ("FOIA") request sought disclosure of "all records upon which all publicly released aircraft flight path climb conclusions are based, including, but not limited to, the underlying data and basis of all written reports and all video-animation-depictions." App. A at 8. "Lahr filed suit against the NTSB [and] [t]hereafter he added as defendants the CIA and National Security Agency ("NSA") . . . "[7] App. B at 67.

The Freedom of Information Act gives district courts exclusive jurisdiction to "enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B). In two

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[7] Although the CIA is the principal defendant, it was not initially named because Lahr in good faith relied on that Agency's denial of its possession of responsive records. *See* Fee Order, App. D at 191:

> In its January 26, 2001 FOIA response letter, the CIA wrote, "[w]e have researched this matter, and have learned that the pertinent data, and resulting conclusions, were provided by the National Transportation Board (NTSB). CIA simply incorporated the NTSB conclusions into our videotape." . . . (Mot., 7:9-12) (citing June 16, 2004 Lahr Affidavit, Ex. 16). That was not correct.

"thorough opinions" (App. A at 9), issued in August and October of 2006, the district court granted in part and denied in part the three government partial summary motions, holding, *inter alia*:

- The FOIA's balancing test is inapplicable to Exemption 5, and thus, some of the information that had been withheld under the deliberative process privilege need not be disclosed
- Under the FOIA's balancing test, the privacy protections afforded by Exemption 7(C) do not shield the names of eyewitnesses from disclosure

Both holdings involve solely questions of statutory interpretation.

The district court resolved the first by holding, *inter alia*, that its analysis of the deliberative process privilege withholdings under Exemption 5 is limited to adjudication of whether the privilege is properly asserted. Once the court concluded that they did fall within the privilege, and thus fell under Exemption 5, the district court had no discretion to order disclosure. "[T]his Plaintiff-proposed balancing test is inapplicable to Exemption 5 . . . There, the only test the Court may apply is whether the record is both predecisional and deliberative." App. B n. 33 at 86.

As the government filed no transverse affidavits[8] on the issue of government impropriety, there was no question of material fact[9] to be decided on the court's resolution of the dispute over eyewitness names under Exemption 7(C)'s balancing test. "Defendants did not file any response to that statement [of genuine issues], so on this motion, at least, Plaintiff's assertions have not been repudiated." App. B at 60.

To determine whether a record is properly withheld, district courts must balance the privacy interest protected by the exemptions against the public interest in government openness that would be served by disclosure. *See Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 171 (2004); *United States Dep't of Defense v. Fed. Labor Relations Auth.*, 510 U.S. 487, 494-95 (1994).

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[8] Lahr filed affidavits from 29 expert and fact witnesses. The experts include former NTSB member, Dr. Vernon Gross, and retired Rear Adm. Mark Hill, as well as two aerodynamicists and six air-crash investigators, three of whom were parties inside the TWA Flight 800 probe. Seven of Lahr's affiants are eyewitnesses, four of whom saw the disaster from the air. All refute the government's zoom-climb hypothesis, including two eyewitnesses who are featured in the CIA's zoom-climb animation.

[9] "'When the moving party meets its burden, the adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.' Fed. R. Civ. P. 56(e)." App. B at 70.

"[A]s a general rule, when documents are within FOIA's disclosure provisions, citizens should not be required to explain why they seek the information." *Favish*, *id.* at 72. But where the government's basis for withholding the contested records is Exemption 7(C), "the usual rule that the citizen need not offer a reason for requesting the information is inapplicable." Instead, the requester must "establish a sufficient reason for the disclosure." *Id.*

The district court wrote that "[f]or the purpose of determining whether Exemption 7(C) (and other FOIA provisions) are applicable, and only for that purpose, the Court finds that, taken together, this evidence is sufficient to permit Plaintiff to proceed based on his claim that the government acted improperly in its investigation of Flight 800, or at least performed in a grossly negligent fashion. Accordingly, *the public interest in ferreting out the truth would be compelling indeed.*" App. B at 60-67 (emphasis added). The district court's analysis under the heading *Plaintiff's allegations of impropriety*:

> According to Plaintiff then, the government withheld evidence from the Flight 800 probe. The government altered evidence during the investigation. Evidence was removed from the reconstruction hangar. The government misrepresented radar data, which does not correspond to the "zoom-climb" conclusion. Radar data and flight recorder data are missing. It appears that underwater videotapes of the debris from the plane have been altered.

The government concealed the existence of missile debris field and debris recovery locations. At its first public hearing, the NTSB did not permit eyewitness testimony. Many eyewitnesses vehemently disagree with the conclusions the CIA expressed in the video animation. The CIA falsely reported that only twenty-one eyewitnesses saw anything prior to the beginning of the fuselage's descent into the water. The FBI took over much of the investigation from the NTSB, which should have been in charge, and the CIA never shared its data and calculations of the trajectory study with others for peer review, which would have been appropriate.

Plaintiff also submits evidence that the government's conclusion that there was a center-wing fuel tank explosion and the government's "zoom-climb" theory were physically impossible under the circumstances. For example, evidence suggested there was no spark in the center-wing fuel tank.

Once an explosion occurred, engine thrust would have been cut off with the loss of the nose of the plane. Furthermore, the aviation fuel used in Flight 800 is incapable of an internal fire or explosion. The zoom-climb theory is impossible because at least one wing separated early in the crash sequence. Additionally, a steeper climb would likely result in a reduction in ground speed, which contradicts radar evidence. In fact, Plaintiff's evidence suggests the "zoom-climb" theory is aerodynamically impossible.

> Finally, Plaintiff also claims that there were "military assets" conducting classified maneuvers in the area at the time of the crash, and several vessels in the area remain unaccounted for.

App. B at 60-67 (footnotes omitted).

C. The Court of Appeals Decision

The government appealed only the district court's holding that Exemption 7(C)'s equitable balancing test mandates disclosure of the eyewitnesses' names.

Lahr appealed the district court's holding that the FOIA's balancing test is inapplicable to resolutions of disputes under Exemption 5's deliberative process privilege.

Regarding the district court's order to provide complete copies of ten documents, from which the names of 233 eyewitnesses and one supervisory FBI agent had been redacted, the panel wrote that it was "compelled by precedent – especially by a recent case of this court, *Forest Service Employees for Environmental Ethics v. U.S. Forest Service*, 524 F.3d 1021 (9th Cir. 2008) . . . to reverse this holding." App. A at 16. The panel wrote that, under FOIA Exemption 7(C)'s balancing test, the public could benefit from disclosure only if Lahr contacted the eyewitnesses "directly," and any contact would infringe on the privacy interests sought to be protected by Exemption 7(C).

The panel ruled against Lahr and affirmed the district court's Exemption 5 holding that "any discretion retained by the district court was limited to determining whether the withheld documents fell within the scope of the claimed privilege." App. A n. 15 at 32. The panel wrote:

> Relying on *General Services Administration v. Benson*, 415 F.2d 878, 880 (9th Cir. 1969), Lahr contends that traditional equity principles apply to determine whether withholding is warranted under Exemption 5. *See Benson*, 415 F.2d at 880 (holding that courts must weigh "the effects of disclosure and nondisclosure, according to traditional equity principles"). We have subsequently explained that the FOIA context is different, and that *Benson*
>
> > merely recognized that where documents normally privileged in the civil discovery context are involved, courts may employ in exemption 5 cases the same equitable principles that they may use to fix the scope of discovery in civil litigation against an agency. Except in this limited sense, however, courts do not possess 'equitable discretion' to deny FOIA requests.
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> *Maricopa Audubon Soc'y v. U.S. Forest Serv.*, 108 F.3d 1082, 1088 n.4 (9th Cir. 1997).

Id.

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REASONS FOR GRANTING THE PETITION

A. Where it is undisputed that the government misrepresented eyewitness accounts of a crime, prohibiting disclosure of the identities of these witnesses results in a blanket rule of non-disclosure not contemplated under the FOIA

In this case, the government did not dispute that it falsified its account of the disaster. In reality, it could not. Its zoom-climb hypothesis violates several immutable laws of physics,[10] in addition to being contradicted by all forensic evidence,[11] virtually all of which the government either deleted, altered, removed, hid, or misrepresented. Government misconduct was so pervasive that non-governmental investigators[12] smuggled evidence out of the probe to give to the news media.[13]

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[10] "[E]ngine thrust would have been cut off with the loss of the nose of the plane." App. B at 65. "[T]he aviation fuel used in Flight 800 is incapable of an internal fire or explosion." *Id.* The aircraft did not slow and thus could not have climbed. *Id.* at 64. n. 18. "Evidence suggests the 'zoom-climb' theory is aerodynamically impossible." *Id.* at 66 n. 25. "*See Hill Aff.*, at ¶ 4 (Bates 51) (airplane at more than twenty degrees inclination will stall because it will no longer produce lift); *Pence Aff.*, at ¶ 8 (Bates 259) (same); *Lahr Aff.*, at ¶ 62 (Bates 275) (plane would have stalled about one and a half seconds after nose separation); *see generally Third Lahr Aff.* (under physical characteristics concluded by government, aircraft could never have reached impact point)." *Id.*

[11] The break-up sequence, the radar data, the photographic evidence, the underwater imagery, the explosive residue, the flight data recorder, the cockpit voice recorder, the climb analysis data.

The undisputed impossibility of the government's zoom-climb hypothesis begs the question posed by the CIA in its animation, *What Did The Eyewitnesses See*? Lahr wants to ask these witnesses. The CIA did not. Its analysts relied exclusively on FBI 302 interview reports, having interviewed *no* witnesses. The NTSB interviewed *one* eyewitness,[14]

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[12] NTSB investigations are conducted under the Party Process, under which non-governmental groups, or parties, possessing expertise in particular disciplines, are included in the process.

[13] Lahr's Excerpts, *Holtsclaw Aff.*: "[In] 1996, I provided to Captain Richard Russell the Radar tape . . . recorded at the New York Terminal Radar . . . authentic. . . . The tape shows a primary target at the speed of approximately 1200 knots converging with TWA-800 . . . It also shows a U.S. Navy P-3 pass over TWA-800 seconds after the missile has hit TWA-800." *See also Sanders Aff.*: Evidence smuggled out in 1996 by TWA Captain Terrell Stacey to investigative reporter James Sanders, including seat padding of reddish residue sample of missile exhaust (that *60 Minutes* freely surrendered to the FBI).

[14] The only witness ever interviewed by the NTSB was Eastwind pilot Captain David MacLaine. He was staring directly at Flight 800 when it exploded, piloting an aircraft at about 17,000 feet. The transcript of his real-time Air Traffic Control: "Ah we just saw an explosion up ahead of us here about sixteen thousand feet or something like that. It just went down – in the water." (Lahr's Excerpts ATC Transcript *MacLaine*.) MacLaine's next day Report also reported that the aircraft fell downwards. When the NTSB interviewed MacLaine in March of 1999 – over two years after both the CIA and NTSB announced

(Continued on following page)

notwithstanding that its enabling statute mandates that it do so.[15]

The FBI provided the CIA 233 interview reports. The CIA used these reports to generate its report said to analyze what the witnesses saw, which, in turn, formed the basis of the CIA video, *What Did The Eyewitnesses See?* The CIA released its written analysis, but redacted the names appearing adjacent to the witnesses' accounts.

Here, evidence of the government's misrepresenting, then concealing eyewitness accounts from public view pervades the investigative history of the government's four-year probe, as the district court observed. "*See Hill Aff.*, at ¶ 7, Exh. 1, p. 2 (Bates 46) (no

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their zoom-climb conclusions – he was repeatedly clear that all the debris fell downwards out of Flight 800, not upwards. (Interview Transcript *MacLaine Id.*) Had the aircraft climbed, it would have done so through MacLaine's airspace.

[15] *See, e.g.*, Affidavit of former NTSB member Vernon Gross (Lahr's Excerpts): "[B]y a mandate of the Congress, there is one body, the National Transportation Safety Board, that is entirely charged with the investigation of any transportation accident . . . Any time you take away from the NTSB, which, by congressional charter, must be in charge, and have the FBI say that they [NTSB] will not investigate or interrogate any witnesses whatsoever, that immediately raises an issue in my mind about the politics of it." *See also* 49 U.S.C. § 1131(a)(2) (same); 49 C.F.R. Part 831, *Accident/Incident Investigation Procedures*; 831.5 *Priority of Board Investigations* (same, requiring agencies to timely exchange information); 49 U.S.C. § 1131(a)(2)(B) (amendment after TWA hearings providing mechanism to declare probe criminal before the FBI can divest the NTSB of primary jurisdiction).

witnesses allowed to speak at hearings); *Lahr Aff.*" (App. B at 63). The "FBI objected to [the] use of [the] CIA video and witness materials or testimony at [the] public hearing." *Id.* n. 15.[16] "Many eyewitnesses vehemently disagree with the conclusions the CIA expressed in the video animation" (*id.*), and Lahr is "not aware of any witness produced by FBI, CIA or NTSB that corroborated 'zoom-climb' theory." *Id.* n. 16.

Of the 183 known eyewitnesses to missile fire,[17] only a scattering of the accounts from these witnesses

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[16] *See also Id.* n. 7:

> *See Affidavit of Rear Admiral Hill*, at ¶ 17, Exh. C, pp. 2-3 (Bates 46-47) (adopting claims of William Donaldson, a deceased Naval Commander, that the NTSB assisted DOJ in hiding a witness and that the head of the FBI investigation placed the investigation in "pending inactive status" to avoid testing missile theory and to hide witness testimony); *Affidavit of James Speer*, at ¶¶ 14-15 (Bates 184) (ALPA's representative during the official probe claims that FBI covered up positive test for nitrates and hid airplane part); *Perry Aff.*, ¶ at 50 (Bates 253) (FBI agent stated witness was too far away to see what she claimed); *Lahr Aff.*, at ¶ 52-54 (Bates 273) (FBI would not allow Witness Group to conduct witness interviews, contrary to normal NTSB procedure); *Young Aff.*, at ¶ 2(f) (Bates 394) (non-governmental parties to investigation had no access to FBI witness summaries for over [a] year).

[17] After the NTSB Witness Group reconvened (it had been disbanded), the FBI allowed Safety Board investigators to review 458 interview Reports, with names redacted, "provided no notes were taken and no copies were made," according to the resultant October 17, 1997, *Witness Group Factual Report,* NTSB Exhibit 4A (*see* Lahr's Excerpts). As the district court observed, the "Witness Group factual report states that, of 183 witnesses who

(Continued on following page)

appeared in print in lesser publications, and not a single account in the New York Times. The sad fact is that any eyewitness who desires to share his observations with the public is compelled to purchase advertising space. On the eve of the second public hearing, after four years of being ignored, six eyewitnesses placed a full-page advertisement in the Washington Times, entitled *We Saw TWA Flight 800 Shot Down By Missiles And We Won't Be Silenced Any Longer.* The August 2000 advertisement is subtitled "Here

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observed a streak of light, 96 said it originated from the surface." App. B at 64 n. 16. Conspicuously absent from the NTSB's public docket, containing "over 3,000 [case] documents" (App. A at 7), is this incriminating *Witness Group Factual Report*.

That Report also recounts that "[o]n July 21, 1996 . . . Assistant U.S. Attorney Valerie Caproni informed Norm Weimeyer, head of the Flight 800 probe's operations group, 'that no interviews were to be conducted by the NTSB.' " At the time, Caproni was Assistant U.S. Attorney in the Criminal Division of the United States Attorney's Office, Eastern District of New York. In August 2003, FBI Director Mueller named her General Counsel of the FBI. *See* Corporate Legal Times, *The Chosen One*, Oct. 2004, R. Vosper: "In addition, Caproni ruffled some feathers when she charged James Sanders, a freelance journalist, for removing a piece of the wreck in order to test it in a lab for explosive residue . . . 'Conspiracy theorists came out of the woodwork before the last piece of the plane hit the Atlantic,' she says."

See App. F at 202: Graphic reprinted from March 10, 1997 Press Enterprise Newspaper article, *New Data Show Missile May Have Nailed TWA 800, Debris Pattern Provides Key to Mystery*, reporting that "author and investigative reporter" James Sanders had gathered and reviewed evidence from which he had concluded that the crash was the result of a collision with a missile.

Are A Few Of The Hundreds Of Our Statements The FBI Concealed," followed by six eyewitness accounts. It ends, "America Must Know The Truth." It is reprinted here, App. F at 207-12, and states in part:

> We are some of the hundreds of eyewitnesses to the crash of TWA Flight 800 that killed 230 people off the coast of Long Island on July 17, 1996.
>
> We are OUTRAGED that the FBI would not let a single one of us testify at the NTSB's public hearing . . . The FBI feared that our testimony would undermine the video produced by the CIA that was shown on national television to persuade viewers that we all mistook the plane's burning fuel for a missile . . .
>
> * * *
>
> We are INCENSED that for nearly four years the FBI refused to release its hundreds of reports of interviews with eyewitnesses who told them what we saw – the plane being hit by missiles . . .
>
> * * *
>
> And we are SHOCKED at the lengths to which the FBI, the CIA and the NTSB have all gone to discredit and ignore our testimony in order to hide the truth.
>
> * * *
>
> Hundreds of us SAW what happened. The FBI, the CIA and the NTSB must not be

> allowed to get away with this cover-up by defamation of the eyewitnesses . . .
>
> * * *
>
> Admiral Thomas H. Moorer, former Chairman of the Joint Chiefs of Staff, has said, "All the evidence would point to a missile."
>
> * * *

App. F at 207-212.

The advertisement generated no media attention.

The district court reasoned that disclosure might "assist Plaintiff in investigating and uncovering government malfeasance by, for instance, leading to individuals who might repudiate what the government attributed to them or might even declare that the government misused or misrepresented the information they provided." App. C at 105. The court reasoned that privacy implications from disclosure, on the other hand, would be minimal.

> Defendants proffer no assertions by any of the eyewitnesses, *even in camera*, that they wish to avoid being asked for information. Even assuming these individuals ultimately were contacted, if they were not interested in responding to inquiries, they could easily decline to be interviewed. Therefore, the consequences arising from disclosure appear slight.

App. B at 104-05.

The panel relied on *Forest Service Employees for Environmental Ethics v. U.S. Forest Service*, 524 F.3d 1021 (9th Cir. 2008) in reversing the district court's holding. That case adjudicated the disclosure of the names of 23 employees that the Forest Service had redacted from its Report on a controversial fire that killed two of its own employees, and which led to OSHA citations and criminal charges. The panel concluded that *Lahr* "is for all relevant purposes identical to that in *Forest Service Employees.*" App. A at 25. The panel wrote that, under FOIA Exemption 7(C)'s balancing test, the public could benefit from disclosure only if Lahr contacted the eyewitnesses "directly," and any contact would infringe on the privacy interests sought to be protected by Exemption 7(C). Disclosure of "identities . . . alone will shed no new light on the [Agency's] . . . performance of its duties beyond that which is already publicly known." *Id.* at 24, quoting *Forest Service*.

The panel's conclusion that eyewitnesses who are not among Lahr's affiants are "heretofore silent witnesses" who "have by their silence indicated that contact is unwelcome" (App. A at 19-20[18]) works a near

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[18] The panel reasoned:

> In *Forest Service Employees*, '[t]he fact that the record does not indicate that any of the employees ha[d] spoken out in the five years since the incident occurred le[d] us to conclude that such contacts [were] unwanted.' *Id.* Similarly here: Although some of the eyewitnesses have spoken out, and indeed, have joined Lahr in insisting that the NTSB and CIA reconstructions do

(Continued on following page)

blanket rule of nondisclosure of eyewitness names, even where all indications that witnesses to the event – whose accounts were first, misrepresented, and, second, ignored – *want* to be heard. Under the panel's analysis, the more likely it is that disclosure would "open up the inner workings of government to public scrutiny" (*Department of Air Force v. Rose*, 425 U.S. 352, 372 (1976)), because "inquiries by media representatives [are] substantially more likely" (App. A at 20), the less likely the court is to order disclosure.

Once it is determined that a FOIA plaintiff seeks disclosure of names of eyewitnesses in an effort to contact them to corroborate or refute what the government attributed to them, the inquiry is at an end, because the witnesses, or at least those who are not among the plaintiff's affiants, have not "come forward publicly." *Id.* at 19. Under the Ninth Circuit's reasoning, the greater the possibility that disclosure of the records will reveal government corruption or negligence, thereby fulfilling the purpose of the FOIA, the greater the reason to keep the documents from the public.

> not accord with their perceptions, others have not come forward publicly despite the widespread publicity given the reconstruction of the incident. It is presumably these heretofore silent witnesses whom Lahr wishes to contact. *Forest Service Employees* indicates that these witnesses have by their silence indicated that contact is unwelcome.

App. A at 19-20.

The privacy issue before the lower courts was whether disclosure of the names corresponding to accounts that these witnesses allegedly provided to investigators was a warranted disclosure under Exemption 7(C), which allows withholding records only if disclosure could be "an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). Warranted invasions of the personal privacy are not exempt. Under the panel's analysis, avoidance of direct contact is analyzed the same in cases involving government corruption as it is where the FOIA plaintiff seeks disclosure to facilitate learning whether statutes are being diligently enforced.[19]

The panel's decision is an untenable expansion of this Court's holding in *United States Dep't of Defense v. Fed. Labor Relations Auth.*, 510 U.S. 487

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[19] The panel cited *Painting Indus. of Haw. Mkt. Recovery Fund v. U.S. Dep't of Air Force*, 26 F.3d 1479, 1484-85 (9th Cir. 1994), where a labor organization sought the release of payroll records submitted to the Air Force by a government contractor working on an Air Force base in an effort to learn whether the Air Force was diligently enforcing a federal wage statute. *Id.* at 1481. Direct contact with the employees was necessary to accomplish the organization's goal, and it was held that Exemption 6 authorized the Air Force to withhold the payroll records because the only "additional public benefit" the release of the employees' personal information would provide was "inextricably intertwined" with the invasion of the employees' privacy. *Id.* at 1485. Avoidance of harassment is a cognizable privacy interest under the FOIA, protecting against "unwanted commercial solicitations." *Id.* at 1479.

(1994), where Exemption 6[20] authorized the Defense Department to withhold the home addresses of its employees from its response to a FOIA request filed by the unions representing the employees. *Id.* at 502. Noting that the unions sought this information precisely because nonunion employees had decided not to share it with them, the Court found it "clear" that such employees had "*some* nontrivial privacy interest in nondisclosure, and in avoiding the influx of union related mail, and, perhaps, union-related telephone calls or visits, that would follow disclosure." *Id.* at 501 (emphasis in original).

In *United States Dep't of State v. Ray,* 502 U.S. 164, 178-79 (1991), this Court applied Exemption 6 to withhold the identities of Haitian refugees interviewed in State Department reports where there was no indication that an additional round of interviews by the FOIA requester "would produce any relevant information that is not set forth in the documents that have already been produced." The Court explained that an "asserted interest in ascertaining the veracity of the [government's] interview reports" would not outweigh privacy interests, where "[t]here is not a scintilla of evidence, either in the documents themselves or elsewhere in the record, that tends to impugn the integrity of the reports." *Id.* at 179. The same cannot be said here.

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[20] Because of their similar language, Exemption 7(C) is often closely associated with Exemption 6. Exemption 6 protects "personnel . . . and similar files the disclosure of which would constitute *a clearly unwarranted* invasion of personal privacy," whereas Exemption (b)(7) protects law enforcement records which "could reasonably be expected to constitute *an unwarranted* invasion of personal privacy" (emphasis added). However, Exemptions 7(C) and 6 "differ in the magnitude of the public interest that is required to override the respective privacy interests protected by the exemptions," the former being more protective of privacy than the latter. *United States Dep't of Defense v. Fed. Labor Relations Auth.*, 510 U.S. 487 (1994), 496 n. 6.

As one court explained, "[f]or example, the public may have an interest in knowing that a government investigation itself is comprehensive, that the report of an investigation released publicly is accurate, that any disciplinary measures imposed are adequate, and that those who are accountable are dealt with in an appropriate manner." *Stern v. F.B.I.*, 737 F.2d 84, 92 (D.C. Cir. 1984). According to this Court, "[t]he basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). "[A] basic purpose of the FOIA is to . . . [provide] a needed check against corruption." *Id.*

"In this case," wrote the Ninth Circuit, "because only the names of witnesses and agents are missing from the released documents, under the applicable precedents the 'marginal additional usefulness' of the names in exposing government misconduct must outweigh the privacy interests at stake." App. A at 23 (citation omitted). The panel dismissed the district court's observation that, "[o]n the other hand, disclosure of these persons' identities ultimately could contribute significantly to the 'public understanding of the operations or activities of the government.'" App. B at 105 quoting *United States Dep't of Defense v. Fed. Labor Relations Auth.*, 510 U.S. at 494 (1994)

On the issue of disclosure of witness identities, the Ninth Circuit treats all law enforcement records equally; such a blanket proscription is in derogation of this Court's observation in *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976), that "disclosure, not secrecy, is the dominant objective" of the FOIA. The Ninth Circuit's precedent works a near-irrefutable presumption that the names of witnesses in a criminal probe cannot be disclosed.

Because "Plaintiff's assertions have not been repudiated" (App. B at 61), the panel's holding was a pure question of law. Whether to order disclosure of investigative records of the TWA Flight 800 tragedy is a question of exceptional importance. The question of whether the CIA zoom-climb animation is "the boldest and most flagrant lie ever visited on the American people in peacetime"[21] is an extremely important one. As an event cannot be both impossible and possible at the same time, eyewitnesses did not see the aircraft in "various stages of crippled flight," as the CIA video claims, but rather, they saw something else.

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[21] *First Strike*, J. Cashill & J. Sanders, WND Books 2003, Chap. 9, *The Big Lie*, at 155.

If unchallenged allegations of the government's concealment[22] of the facts of the most controversial disaster in aviation history[23] do not tip the balance in favor of disclosure of the eyewitness' names,[24] nothing would. The Ninth Circuit's precedent results in a near blanket rule of non-disclosure not contemplated under the FOIA.

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[22] *See* Lahr's Excerpts, Affidavit of Air Line Pilot's Association representative James Speer: "[I]t's been successfully covered up, the truth is not known, and there are many people fortunately still working on it trying to discover the truth . . . [I]t was never declared a crime scene . . . So here we are in limbo, a dedicated group of people with a mission to seek the truth, obstructed by the government."

[23] *See* Lahr's Excerpts, Affidavit of Blackhawk pilot Major Fred Meyer: "This was not an accident. . . . If you're conducting a missile shoot under the main traffic control routes into New York City, you have exhibited in my mind, depraved indifference to human life. That's not an accident – under any statute – any codes anywhere. That's murder. Now, if it was a foreign force – that's murder . . . "

[24] Nor did the panel affirm disclosure of names redacted from the CIA's reports on eyewitnesses who have *not* been silent, including Lahr's affiants. *See* district court opinion (App. 63 n. 16): "*See Brumley Aff.*, at ¶¶ 1-2 (Bates 210) (representation in video isn't close to what he saw); *Wire Aff.*, at ¶¶ 2-5 (Bates 214) (what was in video did not represent what he had told agent); *Fuschetti Aff.*, at ¶¶ 1-2 (Bates 191) (pilot of other plane never saw vertical movement); *Meyer Aff.*, at ¶ 5(b) (Bates 193) (aircraft never climbed); *Angelides Aff.*, at ¶ 5 (Bates 215) (animation bore no resemblance to what he saw)." *And see id.* at 62 n. 7: "*Perry Aff.*, ¶ at 50 (Bates 253) (FBI agent stated witness was too far away to see what she claimed).

B. The district court's inquiry into the deliberative process privilege under the FOIA should not be limited to adjudication of whether the privilege is properly asserted, as such an analysis erroneously transforms the qualified privilege into an absolute one

Exemption 5 provides that FOIA disclosure requirements do not apply to information that qualifies as "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). "Exemption 5 withholds from a member of the public documents which a private party could not discover in litigation with the agency." *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 801 (1984). Exemption 5 incorporates all civil discovery privileges; if a document is immune from civil discovery, it is similarly protected from mandatory disclosure under the FOIA.

The discovery privilege at issue here is the deliberative process privilege, which is commonly understood to "cover[ ] documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated. . . ." *NLRB v. Sears,* 421 U.S. 132, 150 (1975).

The deliberative process privilege is a qualified privilege.

Here, the lower courts followed the rule memorialized by this Court in *NLRB* (*supra*), that, in the FOIA context, the standard to be employed is whether the documents would "routinely be disclosed" in civil litigation.[25] Under this analysis, documents for which a party would have to make a showing of need are not routinely disclosed and thus do not fall into this category. As a result, the qualified deliberative process privilege is treated as if it were an absolute one, and courts in FOIA cases do not take into account a party's need for the documents in ruling on a privilege's applicability. Once a government agency makes a *prima facie* showing of privilege, the analysis under FOIA Exemption 5 ceases, and the court does not proceed to balance the interests.

By contrast, in civil litigation, to decide whether to uphold a claim of deliberative process privilege, the court must balance the government's claimed need for secrecy against the court's own need for evidence to resolve a dispute before it. In civil discovery disputes, courts weigh the relative need of the parties and the kind of litigation involved – a balancing test.

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[25] *NLRB v. Sears*, 95 S. Ct. 1504, 1516, n. 15 (1975):

> The ability of a private litigant to override a privilege claim set up by the Government, with respect to an otherwise disclosable document, may itself turn on the extent of the litigant's need in the context of the facts of his particular case, or on the nature of the case. However it is not sensible to construe the Act to require disclosure of any document which would be disclosed in a hypothetical litigation in which the private party's claim is the most compelling. Indeed the House Report says that Exemption 5 was intended to permit disclosure of those intra-agency memoranda which would "routinely be disclosed" in private litigation and we accept this as the law. H.R. Rep. No. 1497, p. 10.

In apparent justification of this disparate treatment of qualified privileges under FOIA, courts observe that the identity of the litigants and the need for the evidence is always the same under the FOIA. The plaintiff's identity is irrelevant, and the sole factor weighing in favor of disclosure under the FOIA, the extent to which disclosure would open up the inner workings of government to public scrutiny,[26] is not considered.

The government's interpretation is unsupported by the legislative history, violates the well-settled principle that FOIA exemptions are to be construed narrowly, and, indeed, is contrary to the purpose of the statute.

Congress did not intend a blanket rule of nondisclosure for deliberative materials. "It is relatively clear from the legislative history that Congress, like most people in 1966, had never heard of the 'deliberative process privilege.' The only privileges specifically mentioned in the legislative history are the attorney-client and work product privileges." McCormick Evid. § 108 (6th Ed.) "Forty years ago a writer found very little authority for any privilege for communications between government officials. At the time the Federal Rules of Evidence were adopted, there were only a handful of cases that recognized the deliberative process privilege. It is only in the last two decades that federal courts have developed the privilege." Wright and Graham, Fed. Prac. & Pro. Chap. 6 *Privileges* § 5680 Official Information – Deliberative Process Privilege.

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[26] *United States Dep't of Defense v. Fed. Labor Relations Auth.*, 510 U.S. at 495: The "only relevant 'public interest in disclosure' . . . is the extent to which disclosure would serve the 'core purpose of the FOIA,' which is 'contributing significantly *to public understanding of the operations or activities of the government*.'" *Id.* (quoting *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. at 775 (1989)) (emphasis in original).

Moreover, "[t]he prediction that Exemption 5 was potentially the 'most far-reaching' of the F.O.I.A. exemptions has proved to be true in practice."[27] This far-reaching application was likely the impetus for President Obama's January 21, 2009, *Memorandum*

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[27] Wright and Graham Fed. Prac. & Pro. Chap. 6 *Privileges* § 5680 Official Information – Deliberative Process Privilege:

> According to a study by the Congressional Research Service of the Library of Congress, the (b)(5) exemption was the second most frequent ground for refusing to disclose under the Freedom of Information Act during its first four years, having been invoked in 375 of 1800 refusals while the trade secret and commercial information exemption was invoked 403 times. *See* Freedom of Information Act Amendments Sourcebook, House Government Operations Committee and Senate Judiciary Committee, 94th Cong., 1st Sess., 1975, p. 104-105.

for the Heads of Executive Departments and Agencies, where he wrote that "Government should not keep information confidential merely because public officials might be embarrassed by disclosure, [or] because errors and failures might be revealed . . . " In Attorney General Holder's March 19, 2009, *Freedom of Information Act Memorandum* of the same name, he wrote the "[a]n agency should not withhold records merely because it can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption."

An agency's withholding of documents must fall into one of nine exemptions. 5 U.S.C. § 552(b)(1)-(9), 552(d). In accordance with the broad disclosure provisions of FOIA, the enumerated exemptions are narrowly construed. *See, e.g., John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989), *reh'g denied*, 493 U.S. 1064 (1990); *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976). Categorical exemption upon making a *prima facie* showing of the qualified deliberative process privilege is a narrow construction. So too with the attorney work product privilege, more accurately referred to as the work product doctrine.[28]

In deference to the "philosophy of full agency disclosure" that animates FOIA, "[t]he Supreme Court has interpreted the disclosure provisions of FOIA broadly. . . ." *Lion Raisins Inc. v. United States Dep't of Agriculture*, 354 F.3d 1072, 1079 (9th Cir. 2004). The purpose of FOIA is to protect "the citizens' right to be informed about what their government is up to." *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989). "Disclosure, not secrecy, is the dominant objective of FOIA." *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976). According to this Court, "[t]he basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

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[28] The work product doctrine, recognized by this Court in *Hickman v. Taylor*, 329 U.S. 495 (1947), (i) protects materials created by non-lawyers as well as lawyers, and (ii) can be overcome if the adversary establishes a substantial need for the material.

"[W]e examine first the language of the governing statute, guided not by a single sentence or member of a sentence, but looking to the provisions of the whole law, and to its object and policy." *John Hancock Mut. Ins. Co. v. Harris Trust & Savings Bank*, 114 S. Ct. 517, 523 (1993) (internal quotations, brackets, and citations omitted).)

After *in camera* reviews, the lower courts allowed the government to withhold one record entirely, and two in part, on the grounds that they were protected under the deliberative process privilege.

- Record 27, an 18-page CIA Report, entitled, *Dynamic Flight Simulation*, dated March 3, 1998, described by the district court "analysis and preliminary conclusions," from which the court ordered disclosure of its title, date and bolded titles, holding the balance to be deliberative. App B. at 172. The panel affirmed. App. A at 34.

- Record 28, a March 1998, 17-page CIA "[d]raft report concerning preliminary analysis and conclusions regarding radar tracking" (App. B at 174), held partially exempt from disclosure, save its title, date, bolded titles, and Appendix. App. A at 34.
- Record 43, a five-page CIA "draft with handwritten annotations reflecting candid discussion and opinion * * * regarding CIA analysis of eyewitness reports about the crash . . . entitled, "An Overview of the C.I.A.'s Analysis of Witness Statements in the TWA Flight 800 Investigation" (App. C at 174), undated, held to be exempt from disclosure in its entirety. App. A at 33.

The sole factor weighing in favor of disclosure under the FOIA, the extent to which disclosure would "open up the inner workings of government to public scrutiny" (*Department of Air Force v. Rose*, 425 U.S. 352, 372 (1976), was not considered.

A record is protected by the privilege if its authors were acting within their statutory authority. Here, they were not. First, the author would have to be oblivious to the fact that the zoom-climb theory violates the laws of physics, as well as the fact that all forensic and testimonial evidence is consistent only with a missile strike. Second, the record itself must be consistent with good faith deliberation leading to a good faith conclusion of the existence of a zoom-climb.

Record 27 is an "eighteen-page CIA document dated March 1998, described by the agency as a '[d]raft report containing analysis and preliminary conclusions regarding further assessment of TWA Flight 800,' on the subject of "Dynamic Flight Simulation" (App. A at 33), written after release of CIA's animation. From its released headings that record undoubtedly purports to explain Flight 800's aerodynamics. But that impossibility is among numerous allegations that defendants did not dispute. "On this motion . . . Plaintiff's assertions have not been repudiated." App. B at 61. *See also id.* at 66: "In fact, Plaintiff's evidence suggests the 'zoom climb' theory is aerodynamically impossible." App. B at 66. Disclosure of the basis upon which the government allegedly relied would reveal false assumptions.

Similarly with the CIA's Record 28, *Analysis of Radar Tracking*. Not one of the dozen sets of Radar data is consistent with any scenario that included a zoom-climb. If this record reflects that Radar corroborates the zoom-climb hypothesis, it is false, and if it contradicts any zoom-climb, it is further evidence that defendant's zoom-climb was knowingly false. Thus, this "radar tracking" record would open up the inner workings of government to public scrutiny.

Record 43, the "Overview of the C.I.A.'s Analysis of Witness Statements," is said to "discuss[ ] the CIA's assessment of individual eyewitness reports," with "[h]andwritten comments and edits appear[ing] on each page." App. A. at 35. Given that the CIA never interviewed a single eyewitness, as well as the government's dissemination of scores of fabrications regarding eyewitness accounts, this record cannot reflect good faith deliberations regarding eyewitnesses' accounts, but, rather, reflects efforts to cover them up.

Like most of the CIA records at issue in the case, these three were generated after the animation's broadcast,[29] but still held to be "predecisional."[30]

Lahr also argued "government misconduct, crime, and fraud bars the application of Exemption

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[29] *See, e.g.,* Lahr's Excerpts, *Clarke Decl.*, listing 23 contested CIA records, only 11 of which predate the broadcast of the CIA animation; *see also id.* at 558 ¶ 13, *Schulze Decl.*: "[N]o supporting aerodynamic calculations were begun until almost a year later [after broadcast of CIA animation]."

[30] The district court reasoned that "[t]he CIA video animation surely has the status of a final agency decision, but . . . the August 23, 2000 NTSB Aircraft Accident Report also is a final agency decision, and to the extent that it does not expressly incorporate the earlier CIA findings, further work on the matter after the November 17, 1997 broadcast would be predecisional." App. B at 111. Lahr argued that a document is predecisional when it is "received by the decisionmaker [sic] on the subject of the decision prior to the time the decision is made," *Sears,* 421 U.S. at 151.

5."[31] But, ruled the panel, "Lahr did not so argue in the district court, and so waived the issue." App. A at 27-28. "Lahr argues that we may nonetheless reach the question because it is purely one of law," but, "[h]ere, considering the issue for the first time on appeal would unfairly prejudice the government . . . Lahr did, of course, make general allegations of government misconduct in the district court, as his entire request is an attempt to prove a massive government conspiracy. But disproving the general, substantive allegations of misconduct is not the government's obligation in FOIA litigation." *Id.* Under this analysis, whether the government falsified its version of the disaster is irrelevant.

As these records purport to explain the impossible, Lahr has made a clear "allegation of a connection between these particular documents and government misconduct," contrary to the panel's reasoning. *Id.* at 29 n. 14.

The government did not deliberate the aircraft's post-initiating event flight trajectory. It deliberated how to cover it up.

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[31] App. A at 27-28: "*See In re Sealed Case*, 121 F.3d 729, 738 (D.C. Cir. 1997) ("[W]here there is reason to believe the documents sought may shed light on government misconduct, the privilege is routinely denied, on the grounds that shielding internal government deliberations in this context does not serve the public's interest in honest, effective government."

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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A-P-P-E-N-D-I-X

TABLE OF CONTENTS

Page

APPENDIX A (Opinion of the U.S. Court of Appeals for the Ninth Circuit, filed June 22, 2009) . . . . App. 1

APPENDIX B (Order of the U.S. District Court for the Central District of California, filed July 31, 2006) . . . . App. 52

APPENDIX C (Order of the U.S. District Court for the Central District of California, filed October 4, 2006) . . . App. 126

APPENDIX D (Order of the U.S. District Court for the Central District of California, filed March 19, 2007) . . . App. 185

APPENDIX E (Order denying Petition For Rehearing *en banc* U.S. Court of Appeals for the Ninth Circuit, filed Jan. 21, 2010) . . . . App. 199

APPENDIX F (Lahr Excerpts of Record U.S. Court of Appeals for the Ninth Circuit)

Graphic reprinted from March 10, 1997 *Press Enterprise* Newspaper article, *New Data Show Missile May Have Nailed* TWA *800, Debris Pattern Provides Key to Mystery* . . . . App. 202

November 17, 1997 CIA Animation,
"What Did The Eyewitnesses See?" four
screen shots

    0:33. . . . . .App. 203
    2:10. . . . . .App. 204
    7:02. . . . . .App. 205
    9:02. . . . . .App. 206

Wash. Times advertisement,
August 15, 2000. . . . . .App. 206

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

H. RAY LAHR,)
)
Plaintiff-Cross-Appellant/Appellee,)
) Nos.06-56717
v.) 06-56732, 07-
) 55709
NATIONAL TRANSPORTATION)
SAFETY BOARD; CENTRAL) D.C. No. 03-
INTELLIGENCE AGENCY;) 8023-AHM
NATIONAL SECURITY AGENCY,)
) OPINION
Defendants/Cross-Appellees-)
Appellants.)
)

Appeal from the United States District Court
for the Central District of California
A. Howard Matz, District Judge, Presiding

Argued and Submitted
August 8, 2008—Pasadena, California

Filed June 22, 2009

Before: Roger J. Miner,* Kim McLane Wardlaw and
Marsha S. Berzon, Circuit Judges.
Opinion by Judge Berzon

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*The Honorable Roger J. Miner, Senior United States Circuit Judge for the Second Circuit, sitting by designation.

COUNSEL

John H. Clarke, Washington, D.C., for plaintiff-cross-appellant/appellee Ray Lahr.

Steve Frank, Leonard Schaitman, United States Department of Justice, George S. Cardona, Acting United States Attorney, and Peter D. Keisler, Assistant Attorney General, Washington, D.C., for defendants-appellants/cross-appellees National Transportation Safety Board, et al.

OPINION

BERZON, Circuit Judge:

Trans World Airlines Flight 800 ("TWA Flight 800") exploded in midair off the coast of Long Island on July 17, 1996, killing all 230 people aboard. The cause of this dramatic and tragic event remains, for some, in dispute, and that dispute underlies this lawsuit brought under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552.

The government, after an extensive investigation, concluded that the accident was caused by an explosion in one of the aircraft's fuel tanks, initiated by an electrical short circuit. Ray Lahr is, to put it mildly, not convinced. He maintains that the government has engaged in a massive cover-up of the real cause, which he suspects is most likely a strike by a missile launched offshore by the U.S. Navy. In an attempt to prove his theory, Lahr initiated more than two hundred FOIA requests for documents and data to federal agencies involved in the investigation. When the agencies gave him only some of the information he asked for, Lahr filed this lawsuit. On summary judgment, the district court ordered the government to release some documents in compliance with his requests but authorized it to withhold others, as exempt from disclosure pursuant to several of FOIA's enumerated exemptions. Lahr appeals several of the district court's rulings authorizing nondisclosure; the government appeals only one of the district court's rulings adverse to it. We affirm in part, reverse in part, and remand.

I. BACKGROUND

A. The Crash and the Investigation

At approximately 8:19 p.m. on July 17, 1996, TWA Flight 800 left John F. Kennedy Airport in New York en route to Charles de Gaulle International Airport in Paris. Twelve minutes after departure, the Boeing 747 aircraft crashed into the Atlantic Ocean. Everyone on board died. According to the government, many eyewitnesses reported seeing a "streak of light, resembling a flare, moving upward in the sky to the point where a large fireball appeared." The eyewitnesses then saw the fireball split into two as it descended toward the water.

The National Transportation Safety Board ("NTSB") launched a broad-based civil investigation into the cause of the crash.[1] As part of its efforts, the NTSB appointed several entities to assist in the investigation, including the Boeing Company, the Air Line Pilots Association, and TWA. Initial examination of the eyewitness reports and information from the cockpit voice and data recorders led the NTSB to narrow the possible causes to three: structural failure of the airplane; a bomb or missile; and an explosion in the fuel tank. The possibility that a bomb or missile destroyed TWA Flight 800 led the FBI to launch a criminal investigation into the incident. As part of its investigation, the FBI asked Central Intelligence Agency ("CIA") weapons analysts for assistance in determining what the eyewitnesses actually saw.

The NTSB's investigation was, in its words, "by far the most expensive and the most extensive in the history of the Board." In the end, the NTSB concluded that the probable cause of the disaster was an explosion of the aircraft's center wing fuel tank, resulting from the ignition of a flammable fuel and air mixture in the tank. Although the NTSB could not determine with certainty what caused the mixture to ignite, it believed the explosion was most likely initiated by a short circuit. The NTSB determined that the explosion could not have been caused by the detonation of a bomb or a missile strike.[2] A multi-agency analysis of the wreckage, ninety-five percent of which was recovered, found no evidence of bomb or missile damage.[3] The unrecovered pieces of the aircraft, the NTSB concluded, were not by themselves large enough to encompass all of the damage that would have been caused by a bomb or a missile. Finally, although trace amounts of explosives were found on three separate pieces of the wreckage, "the lack of any corroborating evidence associated with a high-energy explosion" led the NTSB to conclude that the crash was not caused by a bomb or missile strike.

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[1] The NTSB "is responsible for the investigation, determination of facts, conditions, and circumstances and the cause or probable cause or causes of all accidents involving civil aircraft, and certain public aircraft." 49 C.F.R. § 800.3(a).

[2] The NTSB also ruled out structural failure as a cause of the crash.

To explain the more than 250 eyewitness accounts that described "a streak of light" or "a flarelike object" rising in the sky, the NTSB developed what Lahr calls the "zoom-climb" theory. In essence, the NTSB's theory was that the fuel tank explosion caused the front portion of the aircraft's fuselage to separate from the rest of the plane and fall to the ocean. Having lost the considerable mass of the forward fuselage, the remainder of the plane, now much lighter and on fire, was rapidly propelled upwards in the sky, ascending more than 2,000 feet before itself falling back toward the ocean. As the burning plane fell, the wings separated from the body of the aircraft, and the wreckage erupted into a "fuel-fed fireball" that descended into the water. Thus, the NTSB contends, the streak of light observed by the witnesses was not a missile but the burning plane itself, traveling upward in various stages of "crippled flight" after the initial explosion took place.[4]

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[3] This analysis involved the NTSB, the FBI, the Bureau of Alcohol, Tobacco, and Firearms ("ATF"), and the Federal Aviation Administration ("FAA").

[4] The NTSB concedes that this explanation does not account for fifty-six eyewitnesses who reported seeing a streak of

The NTSB arrived at this conclusion after analyses of radar data, flight data recorder information, and proprietary information about the aircraft's weight and aerodynamics provided by Boeing. NTSB investigator Dennis Crider completed a Trajectory Study, which attempted to determine the location of the plane when various parts fell by mapping the trajectory of the wreckage as it fell to the ocean floor. This study led to the conclusion that the forward part of the plane fell off first. Crider also conducted a computer-modeled flight-path simulation to determine the motion of the main body of the aircraft after the forward fuselage fell off. This simulation demonstrated that the rest of the aircraft would have continued to ascend after the loss of the front of the plane, only later descending toward the ocean. The NTSB also used computer programs, named BALLISTIC and BREAKUP, to figure out the path of certain pieces of the aircraft and the moment when the forward fuselage separated from the main body.

The CIA's analysis also concluded that the eyewitnesses did not see a missile. In its investigation, the CIA examined eyewitness reports, radar tracking data, and information from the cockpit voice and flight data recorders to reconstruct the flight path of the aircraft. The CIA analysts concluded, in accord with the NTSB, that after the initial explosion, the aircraft "pitched upward" more than 3,000 feet before a fireball erupted, and the

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light ascending vertically or originating at the horizon. It attributes this discrepancy to deficiencies in interviewing, documentation, and the eyewitnesses' memory or perception.

remainder of the aircraft then descended rapidly. Thus, like the NTSB, the CIA found that "[t]he eyewitness sightings of greatest concern—the ones which originally raised the possibility of a missile—took place *after* the aircraft exploded."[5]

Both the NTSB and the CIA developed video animations depicting their conclusions regarding the explosion and the subsequent trajectory of the aircraft. The NTSB presented four videos depicting "graphical accident reconstructions" at a December 1997 public hearing. The CIA's video, "What Did the Eyewitnesses See?" was broadcast on CNN in November 1997. The CIA did not release any additional analysis of the accident or conclusions about what the eyewitnesses saw. After the video aired, the CIA continued to refine its analysis based on new data from the NTSB, but its ultimate conclusion—that eyewitnesses did not see a missile—did not change, and the agency did not issue a final report.

In 2000, the NTSB issued its comprehensive final report on the crash, explaining its analysis and conclusions in detail. This report, as well as almost 3,000 documents from the investigation, is publicly available. Included among the documents in the public record are FBI summaries of more than 700 eyewitness accounts, some with names and other identifying information redacted.

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[5] The CIA's initial conclusion, reported in 1997, that the plane ascended 3,200 feet differs from the NTSB's conclusion, reported in 2000, that the maximum ascent was about 2,000 feet.

B. The FOIA Requests and Proceedings in the District Court

Lahr, a former Navy and commercial pilot and a member of the Air Line Pilots Association, believes the TWA Flight 800 investigation resulted in a massive government cover-up of the real cause of the crash. The true story, according to Lahr, is that an errant Navy missile caused the crash. The "zoom-climb" theory is not plausible, Lahr maintains, and was fraudulently concocted to mislead the public.

Lahr, in an attempt to prove his thesis, made 145 FOIA requests to the NTSB in October 2003. Lahr informed the NTSB that he was "seeking the NTSB's zoom-climb data and calculations in order to validate or invalidate the NTSB's and CIA's zoom-climb conclusions." He further elaborated:

> The FOIA Requests are for all records upon which all publicly released aircraft flight path climb conclusions are based, including, but not limited to, the underlying data and basis of all written reports and all video-animation-depictions. This includes but is not limited to all computer simulation and animation programs, and the data entered into all such programs, in each case correlating which data was entered into which program.

At the same time, Lahr made 105 FOIA requests to the CIA. Citing the November 1997 video depiction of the aircraft's trajectory, Lahr indicated that the request was for all records on which the CIA based its conclusions regarding the aircraft's climb and flight path, including those reported in the video depiction.

In response to these requests, both agencies conducted searches for responsive records. They released certain documents (some of which were redacted), withheld some documents, and found no responsive documents for some requests. Dissatisfied with the agencies' responses, Lahr filed this lawsuit under FOIA. The agencies moved for summary judgment, contending that their searches were adequate and that their withholding of certain records or parts of records was proper under various statutory exemptions. On the government's summary judgment motions, the district court, in two thorough opinions, decided in Lahr's favor on 26 of the 32 disputed requests.

The government appeals only one aspect of the district court's ruling. The agencies released eleven documents with the names of eyewitnesses and FBI agents redacted, citing Exemptions 6 and 7(C) of FOIA.[6] On summary judgment, the district court ordered the agencies to release these names, holding that the public interest in disclosure outweighed the privacy interests of the witnesses and agents. The agencies appeal from this decision.

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[6] Exemption 6 states that FOIA does not apply to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Exemption 7(C) provides that FOIA does not apply to matters that are "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy." *Id.* § 552(b)(7)(C).

Lahr cross-appeals several of the district court's rulings. The agencies withheld four documents[7] under FOIA Exemption 5, relating to documents protected under the deliberative process privilege.[8] The district court held that Exemption 5 applied to these documents, as they were both "predecisional" and "deliberative" and thus properly withheld from disclosure.

Lahr's FOIA request also sought information about the agencies' computer simulations. He asked for the software programs used by the CIA and the NTSB in running their simulations, as well as the data inputs the agencies used to generate their results. Although the district court required the government to disclose most of the programs themselves, it held that the agencies could withhold much of the data, including the data inputs used by the BALLISTIC program that Lahr claims determined the aircraft's flight path after the explosion. Lahr appeals from this decision.

Lahr also contends that the agencies' search for responsive records was inadequate. The district court held the government's search adequate in some respects but not others. On appeal, Lahr contests the district court's conclusion that certain aspects of the agencies' search were adequate.

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[7] As the government explained at oral argument, the NTSB subsequently released one of these documents, leaving only three such documents at issue in this appeal.

[8] Exemption 5 provides that FOIA does not apply to "interagency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5).

Finally, Lahr contends that the government's affidavit pursuant to *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973)—generally known as the "*Vaughn* index"—insufficiently described the documents withheld by the agencies and the FOIA exemptions that apply to them.

For the reasons stated below, we reverse the district court's conclusion that the government must disclose the names of the eyewitnesses and FBI agents, and affirm the remainder of the district court's rulings.[9]

II. DISCUSSION

[1] FOIA "was enacted to facilitate public access to Government documents." *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991). The statute provides public access to official information "shielded unnecessarily" from public view and establishes a "judicially enforceable public right to secure such information from possibly unwilling official hands." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976) (internal quotation marks omitted). Doing so, it was hoped, would "ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *John Doe Agency v.*

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[9] While the appeals of the district court's summary judgment decisions were pending, the district court granted Lahr's motion for attorneys' fees, awarding him $146,442 in costs and fees. The government has appealed this award, arguing that, if it prevails on its appeal of the summary judgment decisions, the fee award should be vacated and remanded to the district court for a new determination. Because we reverse part of the district court's summary judgment order, we remand the award of attorneys' fees for reconsideration.

John Doe Corp., 493 U.S. 146, 152 (1989) (internal quotation marks omitted).

[2] At the same time, FOIA contemplates that some information may legitimately be kept from the public. The statute contains nine enumerated exemptions allowing the government to withhold documents or portions of documents. *See* 5 U.S.C. § 552(a)(1)-(9). FOIA's "strong presumption in favor of disclosure" means that an agency that invokes one of the statutory exemptions to justify the withholding of any requested documents or portions of documents bears the burden of demonstrating that the exemption properly applies to the documents. *Ray*, 502 U.S. at 173. Moreover, in light of FOIA's purpose of encouraging disclosure, we have held that "its exemptions are to be interpreted narrowly." *Assembly of Cal. v. U.S. Dep't of Commerce*, 968 F.2d 916, 920 (9th Cir. 1992).

In seeking to justify the withholding of some documents or portions of documents responsive to Lahr's request, the agencies have invoked several FOIA exemptions. We discuss the documents and the relevant exemptions in turn.

A. Eyewitness and FBI Agent Names

In response to Lahr's request, the agencies released several documents that summarize or discuss eyewitness accounts and contain analysis by FBI agents involved in the criminal investigation. The agencies redacted the names of the eyewitnesses and FBI agents in eleven of these documents, but the district court ordered the government to release the names. The government contends that it is entitled to withhold these names from disclosure under FOIA Exemptions 6 and 7(C), which generally recognize that individual privacy interests may justify limiting public disclosure of governmental information in certain contexts. *See Ray*, 502 U.S. at 174-75.

[3] Specifically, Exemption 6 states that FOIA does not apply to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Exemption 7(C) provides that FOIA does not apply to "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C).

Exemptions 6 and 7(C) speak of an "unwarranted" invasion of personal privacy, not any invasion. So, to determine whether a record is properly withheld, we must balance the privacy interest protected by the exemptions against the public interest in government openness that would be served by disclosure. *See Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 171 (2004); *U.S. Dep't of Def. v. Fed. Labor Relations Auth.* (*FLRA*), 510 U.S. 487, 494-95 (1994). Although both exemptions require such balancing, the analysis under the two provisions is not the same, as "Exemption 7(C)'s privacy language is broader than the comparable language in Exemption 6 in two respects." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 756 (1989).

[4] Specifically, Exemption 6 requires that the invasion of privacy be "*clearly* unwarranted," a requirement omitted from the language of Exemption

7(C). *See id.* Second, whereas Exemption 7(C) prevents disclosure of information that "could reasonably be expected to constitute" an unwarranted invasion of privacy, Exemption 6 limits the protection to information that "would constitute" an unwarranted invasion of privacy. *Id.* at 755-56; *see also Hunt v. FBI*, 972 F.2d 286, 287-88 (9th Cir. 1992). In other words, although both exemptions require the court to engage in a similar balancing analysis, they "differ in the magnitude of the public interest that is required to override the respective privacy interests protected by the exemptions." *FLRA*, 510 U.S. at 496 n. 6.

The district court found that the documents at issue were compiled for law enforcement purposes and so met the threshold test for Exemption 7(C). Lahr has not challenged this determination on appeal. So, as the government claimed both exemptions for each disputed redaction, it need meet only the lower threshold of Exemption 7(C). *See Hunt*, 972 F.3d at 288. Because both exemptions require balancing of public and private interests, cases arising under Exemption 6 also inform our analysis. *Id.*

In considering the personal privacy interests at stake, the Supreme Court has emphasized that "the concept of personal privacy under Exemption 7(C) is not some limited or cramped notion of that idea." *Favish*, 541 U.S. at 165 (internal quotation marks omitted). Instead, personal privacy interests encompass a broad range of concerns relating to an "individual's control of information concerning his or her person," *Reporters Comm.*, 489 U.S. at 763, and an "interest in keeping personal facts away from the public eye." *Id.* at 769.

The Supreme Court has also clarified the nature of the relevant public interests served by disclosure. Once the government has identified a cognizable privacy interest, "the *only* relevant public interest in the FOIA balancing analysis is the extent to which disclosure of the information sought would shed light on an agency's performance of its statutory duties or otherwise let citizens know what their government is up to." *Bibles v. Or. Natural Desert Ass'n*, 519 U.S. 355, 355-56 (1997) (per curiam) (alteration and internal quotation marks omitted). Where there are relevant privacy interests at stake, a requester must demonstrate that the interest served by disclosure "is a significant one, an interest more specific than having the information for its own sake," and that disclosure is likely to advance that interest. *Favish*, 541 U.S. at 172. Where the public interest advanced is that officials were negligent or that they otherwise improperly performed their duties, the requester must establish "more than a bare suspicion" of wrongdoing, by "produc[ing] evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred." *Id.* at 174.

Applying these considerations, the district court acknowledged the eyewitnesses' and FBI agents' privacy interest in avoiding exposure of their connection to the incident, but found this interest weak. On the other hand, the district court found that Lahr had introduced sufficient evidence of possible government wrongdoing and that disclosure of the redacted names might direct Lahr to individuals who could "repudiate what the government attributed to them or might even declare that the government misused or misrepresented the information they provided." Accordingly, in balancing the personal privacy interests of the eyewitnesses and FBI agents against the public interest in disclosure, the district court concluded that the balance favored disclosure.

Whether or not we would agree with that conclusion absent controlling case law, we are compelled by precedent—especially by a recent case of this court, *Forest Service Employees for Environmental Ethics v. U.S. Forest Service*, 524 F.3d 1021 (9th Cir. 2008), not available to the district court, to reverse this holding.

1. Privacy Interests

a. Eyewitnesses

[5] We begin with the privacy interests of the eyewitnesses.[10] Releasing unredacted documents would reveal publicly these eyewitnesses' involvement in a controversial criminal investigation. The Supreme Court has indicated that the privacy interests of citizens are highest when disclosure would reveal information collected about them in conjunction with a criminal inquiry, especially where their link to the investigation is the result of "mere happenstance." *Favish*, 541 U.S. at 166. In *Favish*, the Court observed that

> [l]aw enforcement documents obtained by Government investigators often contain information about persons interviewed as witnesses or initial suspects but whose link to

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[10] Because the privacy interests of the eyewitnesses and FBI agents differ, we discuss the interests of each in turn.

> the official inquiry may be the result of mere happenstance. There is special reason, therefore, to give protection to this intimate personal data . . . . In this class of cases where the subject of the documents is a private citizen, the privacy interest is at its apex.

Id. (alteration, citation, and internal quotation marks omitted); *see also Reporters Comm.*, 489 U.S. at 765 ("[D]isclosure of records regarding private citizens, identifiable by name, is not what the framers of the FOIA had in mind."). Nothing in the record suggests that the eyewitnesses' connection to the investigation was anything more than coincidence. They just happened to be in the vicinity when the tragedy occurred, and so saw the incident.

[6] Some concerns about connecting private individuals to criminal investigations are not present here--for instance, the potential for physical harm or the disclosure of particularly embarrassing private details shared in the course of certain investigations. *See, e.g.*, *Ray*, 502 U.S. at 175-76; *Hunt*, 972 F.2d at 288. The potential for unwanted contact by third parties, including the plaintiff, media entities, and commercial solicitors, nonetheless remains.[11] The case law establishes that protection from such unwanted contact facilitated by disclosure of a connection to government operations and investigations is a cognizable privacy interest under Exemptions 6 and 7(C). *See, e.g., FLRA*, 510 U.S. at 501 (protecting the home addresses of U.S. Department of Defense employees from disclosure to union representatives, citing their "nontrivial privacy interest in nondisclosure, and in avoiding the influx of union-related mail, and . . . telephone calls or visits, that would follow disclosure"); *Minnis v. U.S. Dep't of Agric.*, 737 F.2d 784, 787-88 (9th Cir. 1984) (finding an Exemption 6 privacy interest in names and addresses of permit holders seeking to avoid commercial contact); *see also, e.g., McDonnell v. United States*, 4 F.3d 1227, 1255-56 (3d Cir. 1993) (upholding the nondisclosure under Exemption 7(C) of the names of living witnesses interviewed in the criminal investigation of a 1934 fire aboard an ocean liner).

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[11] The district court observed that release of the unredacted documents would disclose only the names of eyewitnesses, and not their home addresses, phone numbers, or other personal information. In this regard, the information is less invasive than information some courts have protected to avoid third-party harassment. *See, e.g., Bibles*, 519 U.S. 355-56 (mailing lists); *FLRA*, 510 U.S. at 502 (home addresses); *Painting Indus .of Haw. Mkt. Recovery Fund v. U.S. Dep't of Air Force*, 26 F.3d 1479, 1484-85 (9th Cir. 1994) (names, addresses, and payroll records). Nevertheless, the release of the witnesses' names presumably is sufficient to enable Lahr to contact them;

Applying these precedents, we recently held in *Forest Service Employees* that government employees cooperating as witnesses in a disaster investigation had a cognizable privacy interest under Exemption 6 in preventing the disclosure of their names in connection with the incident and the official investigation. 524 F.3d at 1025-27. The Forest Service

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contacting the witnesses is precisely why he wants the information. In fact, the ability to contact the witnesses with only their names formed the basis of the district court's conclusion that their disclosure would advance the public interest: "Disclosure might nevertheless assist Plaintiff in investigating and uncovering government malfeasance by, for instance, leading to individuals who might repudiate what the government attributed to them . . ."

had released a report investigating its role in an accident in which two firefighters died fighting a wildfire (the "Cramer Fire"), but redacted the names of all Forest Service employees who were mentioned in the report. *Id.* at 1023. Although the individuals in *Forest Service Employees* were government employees, most were named in the report simply as cooperating witnesses in the investigation rather than as potential wrongdoers. *Id.* at 1026.

Discussing the cognizable privacy interests at stake, we observed that "the potential for harassment that drew the district court's attention was that which would be presented by the media, curious neighbors, and the FSEEE [plaintiff Forest Service Employees for Environmental Ethics] itself." *Id.* Like Lahr, the FSEEE planned to contact the individuals named in the report should their identities be released, and, "[m]oreover, in light of the significant public attention the Cramer Fire received, it is likely that the media and others would join the FSEEE in such pursuit." *Id.*

Further, in *Forest Service Employees*, "[t]he fact that the record does not indicate that any of the employees ha[d] spoken out in the five years since the incident occurred le[d] us to conclude that such contacts [were] unwanted." *Id.* Similarly here: Although some of the eyewitnesses have spoken out, and indeed, have joined Lahr in insisting that the NTSB and CIA reconstructions do not accord with their perceptions, others have not come forward publicly despite the widespread publicity given the reconstruction of the incident. It is presumably these heretofore silent witnesses whom Lahr wishes to contact. *Forest Service Employees* indicates that these witnesses have by their silence indicated that contact is unwelcome.

[7] In short, *Forest Service Employees* dictates the result in this case. As in *Forest Service Employees*, the plaintiff plans to contact the witnesses if their names became available. The crash of TWA Flight 800 generated vastly more national and international media attention than the Cramer Fire, making inquiries by media representatives substantially more likely than in *Forest Service Employees*.[12] Moreover, to identify a cognizable privacy interest under Exemption 7(C), we need not conclude that an invasion of privacy would occur with certainty, but only that it could reasonably be expected. *See Hunt*, 972 F.2d at 288. Applying the holdings of *Forest Service Employees* and its predecessors that avoiding undesired contacts is a protected personal privacy interest—we conclude that the eyewitnesses have more than a de minimis privacy interest in avoiding unwanted contacts by Lahr and others.

b. FBI Agents

[8] The CIA asserts that the FBI agents have a privacy interest "in not being subjected to unofficial questioning about the analytic project or investigation at issue and in avoiding annoyance or harassment in their official, business, and private lives." We have held that "individuals do not waive all privacy interests in information relating to them simply by

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[12] Because FOIA contemplates that "if the information is subject to disclosure, it belongs to all," *Favish*, 541 U.S. at 172, we must consider the effect of releasing the information to the general public and not just to the individual requestor.

taking an oath of public office, but by becoming public officials, their privacy interests are somewhat reduced." *Lissner v. U.S. Customs Serv.*, 241 F.3d 1220, 1223 (9th Cir. 2001) (citation omitted). The directly applicable precedents nonetheless establish that "FBI agents have a legitimate interest in keeping private matters that could conceivably subject them to annoyance or harassment." *Hunt*, 972 F.2d at 288; *see also, e.g.*, *Wood v. FBI*, 432 F.3d 78, 88-89 (2d Cir. 2005); *McDonnell*, 4 F.3d at 1255; *Maynard v. CIA*, 986 F.2d 547, 566 (1st Cir. 1993).

[9] In particular, courts have recognized that agents retain an interest in keeping private their involvement in investigations of especially controversial events. *See, e.g.*, *Lesar v. U.S. Dep't of Justice*, 636 F.2d 472, 487-88 (D.C. Cir. 1980) ("[P]ublic identification of the individuals involved in the FBI's investigation of Dr. [Martin Luther] King [Jr.] would constitute an unwarranted invasion of their privacy *in light of the contemporary and controversial nature of the information*.") (emphasis added). And, lower level officials, like the FBI agents involved here, "generally have a stronger interest in personal privacy than do senior officials." *Dobronski v. FCC*, 17 F.3d 275, 280 n.4 (9th Cir. 1994).

[10] Given the controversial nature of the FBI's investigation and the level of media attention devoted to the accident, *Hunt* directs the conclusion here. Should the names of the FBI agents mentioned in the requested documents be revealed, there is some likelihood that the agents would be subjected to unwanted contact by the media and others, including Lahr, who are skeptical of the government's conclusion. Under the case law of this court and others, this potential is sufficient to establish a cognizable privacy interest.

Lahr contends that the district court properly found the privacy interests of the FBI agents diminished in the face of allegations of official impropriety. We have held that an investigator's privacy interest may be reduced when there are doubts about the integrity of his efforts. *See Castaneda v. United States*, 757 F.2d 1010, 1012 (9th Cir. 1985) (per curiam) ("When the reliability of the investigator's information is in doubt, it is difficult to argue that he has a right to be sheltered from public scrutiny."). There is no evidence here, however, that the particular FBI agents mentioned in the requested documents themselves behaved improperly, or that their individual efforts were unreliable. *See Lissner*, 241 F.3d at 1223-24 (noting the diminished Exemption 6 privacy interests of two city police officers who were arrested for smuggling steroids in their own arrest reports); *Dobronski*, 17 F.3d at 278-79 (holding that an official's Exemption 6 privacy interests were diminished where the official's own misconduct was at issue in the requested documents). In fact, Lahr seeks the names of these agents in part to contact them about alleged impropriety by *other* FBI agents involved in the suspected cover-up. Although the public interest in disclosing government impropriety may outweigh an agent's privacy interests in some circumstances, we cannot say that an FBI agent's privacy interests are reduced because of speculation that he may have information about general improper conduct by the FBI.

[11] Accordingly, as with the eyewitnesses, the case law compels the conclusion that the FBI agents have

a cognizable privacy interest in withholding their names in the requested documents.

2. Public Interest

[12] Holding that the eyewitnesses and FBI agents have cognizable privacy interests does not end the analysis. We must consider whether these interests are outweighed by the public interest advanced in disclosing the eyewitness and agent names in the requested documents.

To advance a relevant public interest, the release of the eyewitness and FBI agent names must "shed light on an agency's performance of its statutory duties or otherwise let citizens know what their government is up to." *FLRA*, 510 U.S. at 497 (alteration and internal quotation marks). That is, the evidence must show some nexus between the specific requested information and unveiling agency misconduct—the public interest advanced here. *See Favish*, 541 U.S. at 172-73. In this case, because only the names of witnesses and agents are missing from the released documents, under the applicable precedents the "marginal additional usefulness" of the names in exposing government misconduct must outweigh the privacy interests at stake. *Painting Indus.*, 26 F.3d at 1486.

The district court concluded that "the public interest in uncovering agency malfeasance and wrongdoing outweighs" any privacy interest retained by the eyewitnesses or FBI agents. Specifically, the district court held that, with respect to the eyewitnesses' names, "[d]isclosure might . . . assist Plaintiff in investigating and uncovering government malfeasance by, for instance, leading to individuals who might repudiate what the government attributed to them or might even declare that the government misused or misrepresented the information they provided." In *Forest Service Employees*, we viewed skeptically the assertion that the public interest is materially advanced by disclosing names of individuals redacted from documents already in the public record. We observed:

> [T]he identities of the employees alone will shed no new light on the Forest Service's performance of its duties beyond that which is already publicly known. Instead, the FSEEE seeks to contact these employees itself . . . to confirm the veracity of the publicly available reports. We have previously expressed skepticism at the notion that such derivative use of information can justify disclosure under Exemption 6.

524 F.3d at 1027; *see also Ray*, 502 U.S. at 178 (questioning, but not deciding, whether a cognizable public interest is presented where "[t]he asserted public interest . . . stems not from the disclosure of the redacted information itself, but rather from the hope that respondents [who made the FOIA requests], or others, may be able to use that information to obtain additional information outside the Government files"). Balancing the relevant privacy and public interests, we noted in *Forest Service Employees* that "the only 'additional public benefit' the release of the employees' personal information would provide"—the ability to contact witnesses or employees to obtain information not contained in the report—"was 'inextricably intertwined' with the invasion of the

employees' privacy." 524 F.3d at 1028 (quoting *Painting Indus.*, 26 F.3d at 1485). After so recognizing, *Forest Service Employees* went on to hold that when "the only way the release of the identities" will benefit the public "is if the public uses such information to contact the employees directly," such use cannot justify release of the information. *Id.*

[13] The situation presented here is for all relevant purposes identical to that in *Forest Service Employees*, so we are bound by the outcome in that case of the balancing of public and private interests. Lahr already possesses the substance of the eyewitnesses' reports and the FBI agents' thoughts as they are expressed in the released memoranda and emails. The only way that the identities of the eyewitnesses and FBI agents mentioned in the documents already released would have public value is if these individuals were contacted directly by the plaintiff or by the media. Under *Forest ServiceEmployees*, such use is insufficient to override the witnesses' and agents' privacy interests, as the disclosure would bring about additional useful information only if direct contacts, furthering the privacy intrusion, are made. *Id.*

[14] Accordingly, we reverse the district court's decision ordering the agencies to release the names of eyewitnesses and FBI agents.

A. "Deliberative Process" Documents

Lahr challenges the agencies' withholding of three documents the agencies claim are part of their "deliberative process" and thus shielded from disclosure under Exemption 5. Exemption 5 provides that FOIA does not apply to "interagency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). Exemption 5 "shields 'those documents, and only those documents, normally privileged in the civil discovery context.' " *Carter v. U.S. Dep't of Commerce*, 307 F.3d 1084, 1088 (9th Cir. 2002) (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975)). "In light of the strong policy of the FOIA that the public is entitled to know what its government is doing and why, [E]xemption 5 is to be applied as narrowly as consistent with efficient Government operation." *Maricopa Audubon Soc'y v. U.S. Forest Serv.*, 108 F.3d 1089, 1093 (9th Cir. 1997) (internal quotation marks omitted).

[15] The agencies invoke the "deliberative process" privilege, which shields certain intra-agency communications from disclosure to "allow agencies freely to explore possibilities, engage in internal debates, or play devil's advocate without fear of public scrutiny." *Assembly of Cal.*, 968 F.2d at 920. To fall within this privilege, "a document must be both 'predecisional' and 'deliberative.' " *Id.*

> A "predecisional" document is one prepared in order to assist an agency decisionmaker in arriving at his decision, and may include recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency. A predecisional document is a part of the "deliberative process," if the disclosure of the materials would expose an agency's

> decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions.

Id. (alteration, citations, and internal quotation marks omitted). Lahr appeals the district court's grant of summary judgment, after review of the documents *in camera*, as to three documents withheld pursuant to the deliberative process privilege.[13] Lahr first argues on appeal that government misconduct bars the application of the exemption. He also challenges the district court's conclusion that the documents were predecisional and deliberative. After reviewing the documents *in camera*, and giving deference to the district court's factual findings on "whether disclosure of the requested information would reveal anything about the agency's decisional process," *Carter*, 307 F.3d at 1088 (internal quotation marks omitted), we hold that, insofar as they were challenged in the district court, they properly fall within Exemption 5.

As a threshold matter, Lahr contends that evidence of government misconduct, crime, and fraud bars the application of Exemption 5. *See In re Sealed Case*, 121 F.3d 729, 738 (D.C. Cir. 1997) ("[W]here there is reason to believe the documents sought may shed light on government misconduct, the privilege is routinely denied, on the grounds that shielding internal government deliberations in this context does not serve the public's interest in honest, effective government." (internal quotation marks omitted)). Lahr did not so argue in the district court, and so waived the issue. *See A-1 Ambulance Serv., Inc. v. County of Monterey*, 90 F.3d 333, 338 (9th Cir. 1996).

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[13] The district court denied the agencies summary judgment as to some other documents withheld under this exemption. The agencies do not appeal this ruling.

Lahr argues that we may nonetheless reach the question because it is purely one of law. We do have limited discretion to consider purely legal arguments raised for the first time on appeal, *see Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480, 1488 (9th Cir. 1995), but that is so only where "consideration of the issue would not prejudice the [opposing party's] ability to present relevant facts that could affect our decision." *Kimes v. Stone*, 84 F.3d 1121, 1126 (9th Cir. 1996). Here, considering the issue for the first time on appeal would unfairly prejudice the government.

Lahr did, of course, make general allegations of government misconduct in the district court, as his entire request is an attempt to prove a massive government conspiracy. But disproving the general, substantive allegations of misconduct is not the government's obligation in FOIA litigation. Nor do Lahr's misconduct allegations specifically relate to the documents at issue under Exemption 5. Accordingly, the government was not on notice before the district court that its failure to submit evidence in response to those allegations would vitiate its deliberative process privilege. We hold, therefore, that Lahr waived this argument by not advancing it in the district court.[14]

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[14] We also have discretion to reach issues not raised before the trial court in "the exceptional cases in which review is necessary to prevent a miscarriage of justice or to preserve the integrity of the judicial process [or] when a new issue arises while appeal is pending because of a change in the law." *Bolker*

1. Predecisional and Deliberative

Lahr's contention is that the agencies improperly withheld these three documents under the deliberative process privilege because they were created after the agency's final decision, for the purpose of interpreting or explaining the decision after the fact. The district court concluded that the CIA's video animation, presented to the public in November 1997 (before the date stated on Records 27 and 28), was a final decision. But the court clarified, however, that the video was not necessarily

> the *only* final disposition. The CIA could have published some sort of addendum stating it had received and considered new data and that it had (or had not) changed its ultimate conclusion. Although this is not what occurred, it also is not what was required. Defendants have presented uncontroverted evidence that the CIA analyzed new data that led it to reach a conclusion. That the later conclusion was no different than the previous one does not preclude it from being "final" for purposes of FOIA.

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v. Comm'r of Internal Revenue, 760 F.2d 1039, 1042 (9th Cir. 1985) (citation and internal quotation marks omitted). Lahr invokes this exception as well, but there is no intervening change in the law, and Lahr cannot meet the miscarriage of justice standard for the same reasons already surveyed, most especially because he has not made any allegation of a connection between these particular documents and government misconduct.

Lahr argues that the district court's analysis is incorrect. Because the CIA's video was a final decision and the CIA issued no subsequent final decision on the matter, Lahr argues, the records that post date the video cannot be "predecisional."

Contrary to Lahr's position, the fact that the CIA did not issue a subsequent report is, under the applicable case law, not dispositive of whether the records are "predecisional." *See Sears*, 421 U.S. at 151 n.18 (cautioning that the "emphasis on the need to protect pre-*decisional* documents does not mean that the existence of the privilege turns on the ability of an agency to identify a specific decision in connection with which a memorandum is prepared"). At the same time, the absence of an identifiable later decision is of considerable relevance to the deliberative process privilege, as evidence of whether a later decision was indeed under consideration. Otherwise, the privilege would be boundless, as "[a]ny memorandum always will be 'predecisional' if referenced to a decision that possibly may be made at some undisclosed time in the future." *Assembly of Cal.*, 968 F.2d at 921.

Applying this understanding, we have rejected the argument that "a continuing process of agency self-examination is enough to render a document 'predecisional.'" *Maricopa Audubon Soc'y*, 108 F.3d at 1094. The documents must be prepared to assist an agency decision-maker in arriving at a future particular decision, although we need not be able to identify retroactively "the actual decision that was made" on the basis of the withheld documents. *Id.*; *see also Sears*, 421 U.S. at 151 n.18. Hence, we have rejected the application of the privilege to protect from disclosure the routine collection of data and analysis where the agency could point only to speculative or generalized purposes for which the information would be used. *See Assembly of Cal.*, 968 F.2d at 921 (holding that the possible future use of adjusted census data in calculating population estimates between censuses did not render the data "predecisional").

[16] Further, although an agency's issuance of a "final decision" with respect to a particular issue does not necessarily preclude the agency from withholding documents prepared in a subsequent evaluation of the question with the goal of confirming or rejecting its earlier conclusions, post-decisional records fall outside the deliberative process privilege if they follow a final decision and are designed to explain a decision already made. As the Supreme Court recognized in *Sears*, the purpose of the deliberative process privilege is to protect the quality of an agency's decision; revealing "communications made after the decision and designed to explain it" do not affect a decision's quality. *Sears*, 421 U.S. at 152.

Under the deliberative process privilege, a record must not only be predecisional, but also "deliberative." A document is "deliberative" if "the disclosure of the materials would expose an agency's decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions." *Assembly of Cal.*, 968 F.2d at 921 (internal quotation marks omitted). We give deference to the district court's factual determination concerning whether that standard is met. *Carter*, 307 F.3d at 1088.[15]

We have reviewed the records *in camera* and discuss below in general terms the applicability of the deliberative process privilege with respect to each of the withheld documents.[16]

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[15] Lahr also contends that the district court erred in failing to apply a "balancing test" to the government's withholding of the three documents under Exemption 5. Relying on *General Services Administration v. Benson*, 415 F.2d 878, 880 (9th Cir. 1969), Lahr contends that traditional equity principles apply to determine whether withholding is warranted under Exemption 5. *See Benson*, 415 F.2d at 880 (holding that courts must weigh "the effects of disclosure and nondisclosure, according to traditional equity principles"). We have subsequently explained that the FOIA context is different, and that *Benson*

> merely recognized that where documents normally privileged in the civil discovery context are involved, courts may employ in exemption 5 cases the same equitable principles that they may use to fix the scope of discovery in civil litigation against an agency. Except in this limited sense, however, courts do not possess 'equitable discretion' to deny FOIA requests.

Maricopa Audubon Soc'y v. U.S. Forest Serv., 108 F.3d 1082, 1088 n.4 (9th Cir. 1997). Thus, any equitable discretion retained by the district court was limited to determining whether the withheld documents fell within the scope of the claimed privilege. Once the court concluded that they did fall within the privilege, and thus fell within one of FOIA's exemptions, the district court had no discretion to order the documents released pursuant to equitable principles. We note, in addition, that the determination whether a particular document is subject to discovery in a specific lawsuit will not necessarily determine whether that same document is subject to FOIA release. The identity of litigants and the need for the document in litigation may render the document nonprivileged in litigation. *See FTC v. Warner Commc'ns, Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984) (per curiam).

2. Documents at Issue

a. Record 27[17]

The first document ("Record 27") is an eighteen-page CIA document dated March 1998, described by the agency as a "[d]raft report containing analysis and preliminary conclusions regarding further assessment of TWA Flight 800," on the subject of "Dynamic Flight Simulation." The document describes the steps CIA analysts took in simulating the flight path of the aircraft, the data and other information important to the calculations, particular challenges the analysts faced in conducting the analysis, and recommendations for agency decisionmakers. Importantly, the document explicitly discusses refining the simulation's conclusions based on additional and more complete data that became available over the course of the investigation, which continued after the release of the November 1997 animation. The district court ordered only the title, date, and bolded headings released.

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[16] As the government's *Vaughn* index did not supply sufficient information for us to determine whether the documents fell within the privilege, and because the content-specific nature of the inquiry makes it unlikely that a more specific *Vaughn* index would have aided our review, we ordered the government to produce these documents for our *in camera* inspection.

[17] Like the district court, we identify the documents by the Plaintiff's record numbers.

Our *in camera* review of the document confirms that it is predecisional for the purposes of the deliberative process privilege. Although it is dated after the November 1997 CIA animation, it was clearly prepared for the specific purpose of aiding the agency in its determination of the likely flight path of the aircraft following the explosion, a determination central to the CIA's task of explaining what the eyewitnesses actually saw. Although the document discusses prior CIA estimates of the aircraft's flight path, it also reviews those estimates and makes recommendations.

[17] The document is also "deliberative." It exposes in detail the thought processes of the CIA analysts involved in calculating the simulated flight path, as well as language reflecting their decisionmaking process. We agree with the district court that releasing this record would discourage the type of candid discussion necessary for effective formulation of agency decisions, *see Assembly of Cal.*, 968 F.2d at 921, and conclude that the document was properly withheld pursuant to Exemption 5.

b. Record 28

The second document ("Record 28"), titled "Analysis of Radar Tracking," is a seventeen-page "[d]raft report concerning preliminary analysis and conclusions regarding radar tracking of TWA Flight 800." This document also is dated March 1998. Handwriting on the document's first page reads "Draft" and "shown to NTSB but never finalized." As the district court's description notes, the document "contains conclusions and thoughts of CIA analysts concerning the viability and accuracy of certain radar data, the application of such data in determining the flight path of Flight 800, the problems with certain data and the thought processes of individuals who analyzed the data." The district court ordered the government to disclose the document's title, date, bolded section headings, one figure, and the document's appendix, which contains the radar readings on which the document's analysis is based. We agree, after reviewing the withheld portions of the record, that they are both predecisional and deliberative.

[18] The district court did order the agency to release the raw data used in the analysis, which was contained in the document's appendix. The remainder of the document contains the CIA analysts' evaluation of that data, their calculations, and their thought processes. As with Record 27, we agree that release of the document would expose the agency's internal deliberations in such a way that would discourage candid discussion and effective decisionmaking. We therefore conclude that the agency properly withheld this document under the Exemption 5 deliberative process privilege.

c. Record 43

The third document ("Record 43") is a five-page draft document concerning the CIA's analysis of eyewitness reports about the crash. A cover page preceding the document describes it as a "response to allegations of SA [Name] regarding C.I.A. analysis." The document discusses the CIA's assessment of individual eyewitness reports. Handwritten comments and edits appear on each page of the document in different handwriting styles. The district court upheld the withholding of this document in its entirety.

The document is not dated, and its contents do not clearly indicate whether it was created before or after the November 1997 CIA animation. In either case, we are persuaded that the document is predecisional. Each page of the document is labeled "draft," and several blanks appear in the text where data or other information would likely be added. Moreover, the document is a response to one person's criticisms of the CIA's analysis of witness statements, suggesting that it was part of an ongoing process of refining the agency's ultimate conclusions about what the witnesses saw. This conclusion is bolstered by discussions of previous "drafts" of the CIA's conclusion and by the absence of any reference to a final version or to the termination of the CIA's investigation into the matter.

[19] Moreover, the record is clearly deliberative. Aside from the text of the draft itself—which discusses the CIA analysts' impressions of witness statements and the agency's take on the importance and significance of certain witnesses—the handwritten comments on the document, in the words of the district court, "unquestionably are part of a give-and-take exchange." We conclude that the document appropriately falls within Exemption 5 and was properly withheld in its entirety.

In sum, we hold that the withheld portions of each of the three challenged documents properly fall within the scope of Exemption 5.

C. Computer Simulation Inputs

Lahr challenges several of the district court's rulings regarding the computer simulations run by the agencies. We begin with some background to facilitate an understanding of what is and what is not at issue with regard to those simulations. The agencies used several computer simulation programs in their investigation of the crash. The CIA used a program created by the National Security Agency ("NSA"). An NTSB employee, Dennis Crider, wrote his own software program. The NTSB also used two programs called BREAKUP and BALLISTIC. The agencies' use of these programs resulted two types of potentially discoverable information: the software programs themselves and the inputs entered into the programs by the agencies.

As to the first category—the programs themselves—there is no dispute on appeal between the parties. The district court held that the NSA's computer program fell under an exemption, and Lahr does not challenge that conclusion, at least with respect to the software itself. The district court ordered the NTSB to disclose the Crider program, and the agency does not appeal this ruling. Finally, the agency does not contest the district court's order directing the NTSB to search for the BALLISTIC and BREAKUP programs and disclose them, if found, subject to any applicable FOIA exemptions.

The only dispute about the computer simulation programs arises from the nondisclosure of certain of the inputs into these software programs. We discuss below the relevant inputs with respect to each program.

1. NSA Program

The CIA withheld the NSA program, citing FOIA Exemption 3, which exempts from disclosure matters "specifically exempted from disclosure by statute," 5 U.S.C. § 552(b)(3), and pointing to the National Security Agency Act of 1959.[18] Lahr concedes that the NSA program itself falls within this exemption, but argues on appeal that the data inputs are segregable and should be disclosed. The district court concluded that Exemption 3 was "applicable to the software in its entirety." It is not entirely clear, however, whether this pronouncement included what Lahr refers to as the programs inputs, but the government has not released any of these inputs.

Under Exemption 3 and the NSA statute, information is properly withheld if the agency "describe[s] the intelligence activity involved, and . . . show[s] why disclosure of requested materials could reveal the nature of that activity." *Hayden v. Nat'l Sec. Agency/Cent. Sec. Serv.*, 608 F.2d 1381, 1391 (D.C. Cir. 1979). The agency need not make a "specific showing of potential harm to national security" because "Congress has already, in enacting the statute, decided that disclosure of NSA activities is potentially harmful." *Id.* at 1390.

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[18] Specifically, the CIA cited section 6(a), which provides, in relevant part:

> "[N]othing in this Act or any other law . . . shall be construed to require the disclosure of the organization or any function of the National Security Agency, [or] any information with respect to the activities thereof . . . ." National Security Agency Act of 1959, Pub. L. No. 86-36, § 6(a), 73 Stat. 63, 64 (codified as amended at 50 U.S.C. § 402 note).

The CIA submitted an initial affidavit from a senior NSA official stating that "release of the computer program could expose how the U.S. Government analyzes the performance characteristics of foreign weapons systems that are aerodynamic or ballistic." The district court found this description wanting and ordered an *in camera* affidavit. After reviewing that *in camera* submission, the district court concluded that the affidavit sufficiently described how the program, "a unique tool for foreign weapons system analysis," could harm the nation if disclosed. The district court then concluded that Exemption 3 is applicable.

[20] After reviewing the NSA's affidavit *in camera,* we agree with the district court. The affidavit states that the program is used to analyze foreign weapons, and outlines specific reasons why release of the program, including the data inputs, would put the agency's sources and methods at risk. We hold that the affidavit offers a sufficient explanation. The program and the inputs therefore fall within Exemption 3 and were properly withheld.

2. Crider Program

As noted, the district court ordered disclosure of the software for the Crider program, finding that the program itself was not deliberative and therefore did not properly fall within Exemption 5. Lahr contests the district court's conclusion that the simulation inputs did fall within Exemption 5.[19] On appeal, Lahr's sole argument is that a government misconduct exception bars the applicability of Exemption 5. As with the other documents withheld under the deliberative process privilege, we hold that Lahr waived the argument by not raising it before the district court. We therefore affirm the district court's conclusion that the inputs properly fell within Exemption 5.

3. BALLISTIC and BREAKUP Programs

Lahr made two kinds of requests relating to the BALLISTIC and BREAKUP programs. First, he sought the programs themselves. Second, he requested "[a]ll records of the formulas and data entered into the computer simulations regarding the NTSB's zoom-climb conclusion." The district court ordered the government to search for and disclose, if found, the BALLISTIC and BREAKUP programs, subject to any applicable exemptions. The district court also ordered the government to review its records to locate data inputs for the BREAKUP program and disclose that information, if found. The government appeals none of these orders.

The district court also found, however, that the BALLISTIC program, unlike BREAKUP, was "not used in any manner in connection with the 'zoom-climb conclusion,' " and thus held that the data inputs for that program did not fall within the scope of Lahr's request. Lahr appeals this ruling, arguing that the "flight-path of the debris descending"— which he contends the BALLISTIC program modeled—is "inextricably a part of the government's theory that two-thirds of the aircraft ascended."

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[19] The district court does not expressly state that it found the simulation inputs to be deliberative, but it is clear that it so held from the discussion as a whole. Lahr concedes as much in his reply brief, stating that "[t]he district court held that the simulation inputs were privileged as deliberative," and does not challenge the "deliberative" classification on appeal.

The government's declarant stated that the BREAKUP and BALLISTIC programs were not a part of the simulation program for the main wreckage of the aircraft, which modeled the ascent of the aircraft after the separation of the nose section. Instead, these programs were used for determination of the trajectory of certain pieces of the aircraft other than the main section. The declaration provides additional detail for the BREAKUP program, indicating that it was used to determine the "timing of the nose separating from the aircraft." On that basis, the district court concluded that the BREAKUP program was in fact relevant to the zoom-climb conclusion. Importantly, it was the *timing* of the nose separation, not the trajectory of certain pieces of the aircraft, that the district court found related to the zoom-climb theory. This conclusion makes sense, given that the zoom-climb thesis centers on the upward trajectory of the main body of the aircraft following the nose separation and has little to do with other pieces of the plane.

[21] The district court also determined, on the other hand, that the government had demonstrated that the BALLISTIC program was not used in connection with the zoom-climb conclusion. The government's declaration supports this conclusion. It states that the only way in which these programs were relevant to the flight-path simulation was by providing the

timing point at which the nose separation occurred. According to the declaration, this timing information was obtained solely from the BREAKUP program. In light of this evidence, we cannot conclude that the district court's finding that the BALLISTIC program did not contribute to the zoom-climb theory was clearly erroneous. We therefore affirm the district court's conclusion that the data inputs to the BALLISTIC program were not responsive to Lahr's request.

D. Adequacy of Search

FOIA requires an agency responding to a request to "demonstrate that it has conducted a search reasonably calculated to uncover all relevant documents." *Zemansky v. EPA*, 767 F.2d 569, 571 (9th Cir. 1985) (internal quotation marks omitted). This showing may be made by "reasonably detailed, nonconclusory affidavits submitted in good faith." *Id.* (internal quotation marks omitted).

The NTSB submitted detailed declarations describing its search, which involved a search of the public docket, the NTSB's accident investigation files, and the paper records and computer systems of employees responsible for the simulations and animations of the flight path and for the earlier Trajectory Study. The CIA submitted a declaration explaining its search, which included a search of automated records and a manual search of individual analyst files, local databases, email, and desk files. The search was focused on the Directorate of Intelligence, the CIA component determined to be reasonably likely to have records responsive to Lahr's request.

Lahr argues that the government's searches were inadequate, contending that several produced documents prove the existence of additional documents that the agencies failed to produce or to describe in the government's *Vaughn* index.[20] Lahr cites fourteen documents he claims contain references to or suggestions of other documents that should have been produced.

These references and suggestions fall roughly into two categories. In the first category, Lahr points to graphs or charts (some of which are handwritten) that attempt to map the aircraft's trajectory, and he argues that the government must identify the source of the data used to create them. In the second category, Lahr points to references to other specific documents. For instance, the CIA disclosed a redacted letter to Boeing requesting certain "input variables"; Lahr claims that Boeing's response to this letter was neither disclosed nor identified. In another example, pointing to a fax cover sheet that references attached documents, Lahr complains that the government failed to disclose these attachments or describe them in the *Vaughn* index.

In evaluating the sufficiency of an agency's search, "the issue to be resolved is not whether there might exist any other documents possibly responsive to the request, but rather whether the *search* for those documents was *adequate*." *Zemansky*, 767 F.2d at 571 (internal quotation marks omitted); *see also Iturralde v. Comptroller of the Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003) ("[I]t is long settled that the failure of an agency to turn up one specific document in its search does not alone render a search inadequate."). For example, in *Miller v. U.S. Department of State*, 779 F.2d 1378 (8th Cir. 1985), Miller attacked the agency's search by asserting that he had "repeatedly identified for the State Department particular documents which were internally referred to in documents released to him. He argues that the fact that these referenced documents were not sent to him indicates an inadequate search on the part of the State Department." *Id.* at 1384. The Eighth Circuit rejected this challenge:

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[20] As described in the next section, the government must submit an affidavit pursuant to *Vaughn*, 484 F.2d 820, identifying the documents withheld, the FOIA exemptions claimed, and a particularized explanation of why each document falls within the claimed exemption. *Lion Raisins v. U.S. Dep't of Agric.*, 354 F.3d 1072, 1082 (9th Cir. 2004).

> The fact that a document once existed does not mean that it now exists; nor does the fact that an agency created a document necessarily imply that the agency has retained it. Thus, the Department is not required by the Act to account for documents which the requester has in some way identified if it has made a diligent search for those documents in the places in which they might be expected to be found.

Id. at 1385; *see also Maynard*, 986 F.2d at 563-64; *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1201 (D.C. Cir. 1991).

Here, with respect to the data referenced in some of the documents, Lahr only speculates that the agencies have retained records of the data points used to create the various charts. Lahr presents no persuasive evidence however that these records now exist and either evaded discovery during the agencies' searches or were purposely and improperly withheld. The government's submissions describe in sufficient detail the agencies' search for records such as the data used to produce these charts. We are satisfied that the searches were reasonably calculated to uncover responsive documents.[21] The district court found no evidence of either agency's bad faith in conducting their searches, and, aside from his general allegations of government cover-up, Lahr presents no evidence that would undermine the district court's conclusion.

Lahr's claim that the government's searches were inadequate because they failed to uncover the records in the second category—documents referenced in produced records—also fails for similar reasons. As an initial matter, we note that there is a mistake or miscommunication with respect to at least one of the documents allegedly not produced by the CIA.[22] In other instances, it is not clear whether the statements cited by Lahr actually refer to other documents that ever existed, let alone existed at the time of the agencies' searches.[23] With respect to the remaining few documents, Lahr's contentions are too speculative to support the conclusion that the agencies' searches were inadequate. Even if the documents did exist when the agencies conducted their searches, the failure to produce or identify a few isolated documents cannot by itself prove the searches inadequate.[24] Moreover, Lahr makes no specific allegations that the government's searches were fraudulent or that it purposely withheld responsive documents.

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[21] For instance, the NTSB's declaration stated that one person, Douglas Crider, was "responsible for deriving the calculations and/or computations of the flight path for TWA flight 800," and "was the only NTSB staff [member] who created a computer simulation of the flight path of the accident airplane." Crider's declaration describes in detail his several searches for records responsive to Lahr's requests. Douglass Brazy "was the only NTSB staff [member] responsible for creating the animations of the flight path of TWA flight 800 shown at the public hearing on December 8, 1997." In response to Lahr's requests, Brazy "searched [his] office [ ] and the computer systems used to create the animations." The CIA's declaration similarly detailed its search process, which involved supplementing the search of the automated records system with a manual search after the automated search turned up no responsive records.

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[22] In this instance, it appears that the agency either did or intended to produce the document Lahr maintains was not disclosed. Lahr points to icons indicating Microsoft Word documents attached to an email with the subject "Final Reports to the FBI," but represents that the attachments were not disclosed or identified. Yet, according to the *Vaughn* index for this document, the CIA either did or intended to produce the attached documents. This document thus offers no support for the claim that the government's search was inadequate.

[23] For example, Lahr complains that one document appears to be missing pages because it contains a "Figure 1" and a "Figure 8" but no Figures 2 through 7. It is possible that pages are missing, but it is more probable that the document, which is unsigned and undated, was produced in draft form, so that the allegedly missing figures did not yet exist. The document includes place holders for future figures, "figure[s] x and x."

[24] The government, of course, must produce responsive documents *actually uncovered* in a search, unless one of FOIA's exemptions applies.

Finally, Lahr argues that the CIA should have disclosed or identified in the *Vaughn* index a report on TWA Flight 800 by CIA analyst Randolph Tauss, which was the subject of a 2003 *Washington Post* article (the "Tauss Report"). Lahr's argument fails for two reasons. First, as the district court found, the document is not responsive to Lahr's FOIA request. Lahr requested "all records upon which this publicly released aircraft flight path climb conclusion [as set forth in the 1997 video] was based." The document is a narrative recounting of the CIA's participation in the investigation of the crash, including the use of eyewitness reports. Although undated, it is clearly a retrospective look at the CIA's investigation, not a record on which the CIA's conclusion of the flight path was based. Second, a redacted version of the document now appears in the public record. The names of CIA analysts are redacted, but the district court held that these names were properly withheld under Exemption 3, and Lahr has not challenged this ruling on appeal. As Lahr could not get any more of this document than is now available to him, the issue is moot.

[22] In sum, we hold that the agencies' declarations are sufficient to support the conclusion that their searches were reasonably calculated to uncover responsive records and were therefore adequate for the purposes of FOIA.

E. *Vaughn* Index

Government agencies must submit an affidavit pursuant to *Vaughn*, 484 F.2d 820, "identifying the documents withheld, the FOIA exemptions claimed, and a particularized explanation of why each document falls within the claimed exemption." *Lion Raisins*, 354 F.3d at 1082. The *Vaughn* index "must be detailed enough for the district court to make a *de novo* assessment of the government's claim of exemption." *Id.* (internal quotation marks omitted). Lahr makes several challenges to the sufficiency of the government's *Vaughn* index. "We review *de novo* whether the [agency]'s indices and supporting declarations constitute a sufficient *Vaughn* index." *Citizens Comm'n on Human Rights v. FDA*, 45 F.3d 1325, 1328 (9th Cir. 1995).

1. Correlation Records

[23] Lahr first contends that the government's *Vaughn* index fails to identify records "correlating" various information, such as radar, flight data recorder, and cockpit voice recorder data, with its zoom-climb conclusion. The NTSB's *Vaughn* index does specifically address records of the correlation of the zoom-climb calculations with these data, referring Lahr to responsive records available in the public docket or released in response to the FOIA requests, or stating that responsive documents were withheld under Exemption 5. Lahr maintains that the government's "*Vaughn* index should identify the records of the correlations it claims to have performed." We cannot discern from this articulation what additional clarification about the available information Lahr seeks; most likely, he is complaining not about the *Vaughn* index, but about the NTSB's failure to release additional records of this variety. In any event, we conclude that the government's *Vaughn* index sufficiently identifies correlation records.

2. CIA Simulation

Lahr next contends that the government's *Vaughn* index fails to identify the dates on which the government ran the NSA simulation program and whether it was the CIA or the NSA that actually ran it, arguing that he made a specific request for that information.[25] Specifically, Lahr claims that the CIA produced two printouts of the simulation with allegedly different results—one a set of graphical charts bearing the date "5/16/97" and the other, data tables bearing two dates, "3/98" and "3/15/04." Lahr faults the government's *Vaughn* index for failing to state whether both records were generated from the NSA's simulation program.

[24] The documents produced and the *Vaughn* index sufficiently respond to Lahr's request. As to the first document, there is nothing to suggest that the graphical charts were not created on the date specified. According to the government's *Vaughn* index, an email accompanying the charts identifies the CIA agents involved in creating the document, but their names have been redacted under Exemption 3, a redaction Lahr does not dispute. The government's description plainly states that the graphs are depictions of the results of certain aspects of the trajectory simulation program, and the email so confirms. As to the second, it is true that the document contains two handwritten dates, but the "3/98" date is preceded by "dated =," suggesting that the tables report data and results from the simulation run at that time.[26] The document also contains the redacted name of a CIA analyst involved in the simulation, as the *Vaughn* index indicates. The document explicitly says that the data tables are the product of the trajectory simulation program. Viewed together, the documents and the *Vaughn* index are sufficient to answer Lahr's challenge.

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[25] Lahr contends that the relevant request was for "all records reflecting whether or not the NTSB conducted the computer simulations in-house, and, if not, all records of when, where, and by whom the computer simulations were performed."

3. **Affiants' Personal Knowledge**

As a general matter, "[a]n affidavit from an agency employee responsible for supervising a FOIA search is all that is needed to satisfy" the personal knowledge requirement of Federal Rule of Civil Procedure 56(e). *Carney v. U.S. Dep't of Justice,* 19 F.3d 807, 814 (2d Cir. 1994); *see also Maynard,* 986 F.2d at 559-60. Lahr argues that, although agency affidavits under FOIA generally may be made based on information available to the affiant in her official capacity, here, because he has proven fraud, the CIA should be required to produce affidavits based only on personal knowledge. Lahr contends that the CIA omitted certain key documents in its submission to the district court and released documents using a confusing numbering system that complicated his efforts at organizing the CIA's responses.

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[26] The computer printout itself contains the "3/15/04" date that is also handwritten on the front page of the document. The text of the printout, however, also reads, "Boeing proprietary information removed." In context, this most likely indicates that the printout was reproduced at this later date, in response to Lahr's FOIA request.

Lahr properly points out that an agency's proven misconduct can undermine the presumed veracity of its affidavits. *See, e.g.*, *Jones v. FBI,* 41 F.3d 238, 243, 249 (6th Cir. 1994). He points to no authority, however, that proof of fraud obviates the general rule applicable in FOIA cases that an affiant need not have personally conducted the search. Furthermore, Lahr's complaints about the CIA's handling of his FOIA requests might suggest some bureaucratic mismanagement, but they do not prove fraud in that regard.

[25] We hold that the government's *Vaughn* index was sufficient.

* * *

For the foregoing reasons, the district court's decision is AFFIRMED in part, REVERSED in part, and REMANDED for proceedings consistent with this opinion.[27]

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[27] The district court concluded that, as it ordered production of twenty six out of thirty-two contested records, Lahr "substantially prevailed" within the meaning of the statute. Our decision reversing the district court's order that the government release names redacted in eleven documents requires that the district court reconsider its conclusion that Lahr "substantially prevailed." Our reversal on these eleven documents also could alter the district court's assessment of Lahr's entitlement to fees and the calculation of any fees awarded. We therefore remand for reconsideration of the fee award.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO. CV 03-8023 AHM (RZx)

H. RAY LAHR,
Plaintiff,

v.

NATIONAL TRANSPORTATION
SAFETY BOARD, CENTRAL
INTELLIGENCE AGENCY and
NATIONAL SECURITY
AGENCY,

Defendants.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT CIA'S SECOND MOTION FOR PARTIAL SUMMARY JUDGMENT

INTRODUCTION

"Certain historical facts are unassailable, while others are constantly subject to attack and, ultimately, remain shrouded in mystery and confusion." *Minier v. Central Intelligence Agency*, 88 F.3d 796, 799 (9th Cir. 1996). This irrefutable observation aptly describes the controversy that triggered this lawsuit. Barely more than ten years ago on July 17, 1996, a United States commercial aircraft - - TWA Flight 800 - - exploded in mid-air off the coast of Long Island. Everyone aboard perished. What happened? How? Why? Who was responsible? Was it an accident? A terrorist attack?

Of course there was an official investigation. And of course there was an official explanation. And of course there was an ensuing torrent of critics and skeptics who challenged the bona fides of the investigation and rejected the explanation.

Equally predictable, the doubters (or at least Plaintiff, representing one group of them) have now turned to the courts to seek a ruling ordering the Government to turn over information that it has thus far withheld. For the reasons set forth below, I find that plaintiff is entitled to some, but not all, of what he seeks. The Court therefore GRANTS summary judgment to Defendants only as to the records specified below.[1] In doing so, I do not purport to provide an answer to the above much-debated questions nor an affirmation or repudiation of the official government conclusion as to the cause of the flight's crash.

MORI	NTSB	PLAINTIFF	SUMMARY JUDGMENT	DISCLOSURE REQUIRED?
551			GRANT	NO
552		48	DENY	YES

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[1] MORI references are to the last three digits of Government's numbering system. The multiple identifications reflect the sad fact that the parties affixed multiple and confusing identifications to given documents.

553			GRANT	NO
554		12	DENY	YES
555			GRANT	NO
556		1	GRANT	NO
302			DENY	YES
380	33	66	DENY	YES
382	34	76	DENY	YES
382	35	77	DENY	YES
???	36	78	DENY	YES
NSA Computer Program			GRANT	NO

I. Background

A. Factual Summary[2]

1. The Crash Investigation and Ensuing FOIA Litigation

The genesis of this suit lies in the tragic crash of Trans World Airline ("TWA") Flight 800 ("Flight 800"). On July 17, 1996, Flight 800 departed from John F. Kennedy International Airport in New York

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[2] The following factual summary incorporates facts presented in all three of the Defendants' various motions for partial summary judgment.

City, en route to Charles de Gaulle International Airport in Paris, France. The aircraft crashed into the Atlantic Ocean twelve minutes after departure. There were no survivors of the accident and the aircraft, a Boeing 747-131, was destroyed. Some eyewitnesses recounted having seen "a streak of light, resembling a flare, moving upward in the sky to the point where a large fireball appeared.... [and] split into two fireballs as it descended toward the water." *Moye Decl.*, Ex. IV, at p. 278.

The National Transportation Safety Board ("NTSB") is an independent federal agency charged with investigating civil aviation accidents in the United States. 49 C.F.R. §§ 800.3, 831.2. The NTSB conducts investigations in order to determine the circumstances relating to and the probable causes of accidents and to make safety recommendations that are intended "to prevent similar accidents or incidents in the future." *Id.* § 831.4. The NTSB has the authority to designate parties to assist the agency in conducting an accident investigation. *Id.* § 831.11 ("Parties shall be limited to those Persons, government agencies, companies, and associations whose employees, functions, activities, or products were involved in the accident or incident and who can provide suitable qualified technical personnel actively to assist in the investigation."). Following an accident investigation, the NTSB issues its probable cause determination and safety recommendations in an official report. *Id.* § 831.4.

Per its mandate, the NTSB conducted an investigation of Flight 800. The NTSB appointed several entities as party participants to assist in the investigation, including the Boeing Commercial

Airplane Group ("Boeing CAG") and the Air Line Pilots Association

("ALPA").[3] Boeing also voluntarily provided information to the NTSB and Central Intelligence Agency ("CIA") concerning flight characteristics and performance of Boeing 747s. *Third Buroker Decl.* at ¶ 10. The investigation of Flight 800 eventually produced a public docket containing approximately 2,750 documents. Public hearings were held in December 1997 and in August 2000. On August 23, 2000, the NTSB adopted the "Aircraft Accident Report: In-flight Breakup Over The Atlantic Ocean" (the "Accident Report") as the official NTSB accident report on Flight 800. *See* Moye Decl. IV. The parties do not dispute that the Accident Report constitutes the NTSB's final conclusion as to the probable cause of the Flight 800 accident, although Plaintiff claims that the CIA animation, see *infra*, also constitutes a final conclusion.

The NTSB concluded that during the initial break-up of the aircraft, the forward fuselage detached from the remainder of the aircraft. The remainder briefly continued to climb in "crippled flight." *See* Moye Decl., Ex. IV, at pp. 288, 290. Plaintiff Lahr calls this conclusion, of which he is skeptical, the "zoom-climb" conclusion.[4]

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[3] The other parties included the Federal Aviation Administration; TWA; the International Association of Mechanists, Aerospace Workers, and Flight Attendants; the National Air Traffic Controllers Association; Pratt & Whitney; Honeywell; and the Crane Company, Hydro-Aire, Inc. *Moye Decl.*, Ex. IV at p. 302.

Dennis Crider, a National Resource Specialist for Vehicle Simulation in the Vehicle Performance Division of the NTSB, was assigned to the investigation of Flight 800. Crider was tasked with determining the trajectories of parts of the aircraft and the flight path of the main wreckage following the loss of the forward fuselage. *Crider Decl.,* at 3-5. Crider developed four reports in the course of his involvement with the Flight 800 investigation: the Trajectory Study, the Main Wreckage Flight Path Study ("Flight Path Study") and the Errata to the Main Wreckage Flight Path Study, Addendum Ito the Flight Path Study ("Addendum I"), and Addendum II to the Flight Path Study ("Addendum II"). These reports form a part of the extensive Flight 800 public docket and were considered by the NTSB panel (the "Safety Board") prior to its issuance of the Accident Report.

On October 8, 2003, Plaintiff H. Ray Lahr filed over one hundred Freedom of Information Act ("FOIA") requests with the NTSB and CIA, many of which have since been withdrawn. Lahr basically seeks the records upon which the four Crider reports, two video animations shown at the 1997 public hearing, and one

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[4] Defendants construed the term "zoom-climb" conclusion to refer to the flight path of the aircraft following the loss of the forward fuselage." NTSB Mot 'n, at p. 4. This construction of the term corresponds with Lahr's characterization of the "zoom- climb" as "the aircraft's continuing to fly after the nose of TWA 800 was blown off, climbing as much as 3,200 feet." *Moye Decl.*, Ex. I-i, at p. 48.

CIA animation broadcast on the Cable News Network ("CNN")[5] are based. The requests are divided into eleven distinct categories (many of the requests fall into more than one category):

A. All records of formulas used by the NTSB in its computations of the zoom-climb conclusions;

B. All records of the weight and balance data used by the NTSB in its computations of the zoom-climb conclusions;

C. All records of the formulas and data entered into the computer simulations regarding the NTSB's zoom-climb conclusions;

D. All records reflecting whether or not the NTSB conducted the computer simulations in-house, and, if not, all records of when, where, and by whom the computer simulations were performed;

E. The computer simulation programs used by the NTSB and CIA;

F. The printout of the computer simulations used by the NTSB;

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[5] The CIA animation was broadcast on November 17, 1997. NTSB Opp'n, at p. 17.

G. All records of the timing sequence of the zoom-climb, including, but not limited to radar, radio transmissions, and the flight data recorder ("FDR");

H. All records of the correlation of the zoom-climb calculations with the actual radar plot;

I. All records of the information provided by Boeing to the NTSB used by the NTSB to calculate these zoom-climb conclusions;

J. All records of the process by which the NTSB arrived at its zoom-climb conclusions;

K. All records generated or received by the NTSB used in its computations of its zoom-climb conclusions.

Moye Decl., Ex. I-1, at p. 49.

The NTSB and CIA performed searches for these records and located a number of responsive records in the public docket and in responses to prior FOIA requests made by Lahr. They released certain records to Lahr, some of which were redacted. Lahr challenges the adequacy of the agencies' searches and the agencies' decisions to withhold, in full or in part, various records. The agencies assert that their searches were adequate, that they have turned over all responsive records to Lahr, and that they have properly withheld records, in full or in part, under provisions of FOIA that create exemptions from the statute's fundamental mandate of disclosure.

2. Plaintiff's Allegations of Government Impropriety

"[A]s a general rule, when documents are within FOIA's disclosure provisions, citizens should not be required to explain why they seek the information." *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172(2004). Here, however, the Government's basis for withholding many of the contested records is Exemption 7(C) under FOIA, which permits the government to withhold information compiled for law enforcement purposes that "could reasonably be expected to constitute an unwarranted invasion of personal privacy." In such circumstances, "to balance the competing interests in privacy and disclosure [that courts must weigh in applying Exemption 7(C)],. . . the usual rule that the citizen need not offer a reason for requesting the information must be inapplicable." *Id.* Instead, the requester must "establish a sufficient reason for the disclosure." *Id.* "[Where] the public interest being asserted is to show that responsible officials acted negligently or otherwise improperly in the performance of their duties, the requester must establish more than a bare suspicion in order to obtain disclosure. Rather, the requester must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred." *Id.* at 174.

Here, Plaintiff seeks to prove that Defendants participated in a massive cover-up of the true cause of the crash of Flight 800, which he believes was a missile strike from an errant missile launched by the United States military. The following summary of the evidence Plaintiff presented to meet the threshold requirement described in *Favish* is based on Plaintiff's "Statement of Genuine Issues in Opposition to [the Second] CIA Motion for Partial Summary Judgment," especially the portion beginning at page 13. Defendants did not file any response to that statement, so on this motion, at least, Plaintiff's assertions have not been repudiated. Nor did Defendants file objections to that evidence.[6] The ensuing summary characterizes the evidence in the light most favorable to Plaintiff, but does not reflect or constitute any finding by the Court.

According to Plaintiff then, the government withheld evidence from the Flight 800 probe.[7] The government altered evidence during the investigation.[8] Evidence was removed from the reconstruction hangar.[9] The government misrepresented radar data, which does not correspond to the "zoom-climb" conclusion.[10] Radar data[11] and flight recorder data[12] are missing.

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[6] Some of the evidence proffered by Plaintiff was clearly inadmissible and the Court does not consider it. *See, e.g., Hill Aff*, Exh. C, p. 2 (Bates 46) (Donaldson statement meant to prove NTSB helped to hide witness lacks foundation concerning personal knowledge); *Stalcup Aff*, Exh. E, at ¶ 6 (Bates 126) (claim that FBI admitted it recovered explosives material from the debris lacks foundation and contains inadmissible hearsay); *Neal Aff*, at ¶ 3 (Bates 150) (statement concerning possible military operations is opinion without foundation, is irrelevant to the fact it allegedly supports, and contains inadmissible hearsay); *Scalcup Aff*, at ¶ 17 (Bates 121) (whether disclosure would improve airline community's understanding of crash is irrelevant to whether standard accident investigation procedure was followed).

[7] *See Affidavit of Rear Admiral Hill*, at ¶ 17, Exh. C, pp. 2-3 (Bates 46-47) (adopting claims of William Donaldson, a deceased Naval Commander, that the NTSB assisted DOJ in hiding a witness and that the head of the FBI investigation placed the investigation in "pending inactive status" to avoid testing missile theory and to hide witness testimony); *Affidavit*

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of James Speer, at ¶¶ 14-15 (Bates 184) (ALPA's representative during the official probe claims that FBI covered up positive test for nitrates and hid airplane part); *Perry Aff.*, ¶ at 50 (Bates 253) (FBI agent stated witness was too far away to see what she claimed); *Lahr Aff.,* at ¶ 5 2-54 (Bates 273) (FBI would not allow Witness Group to conduct witness interviews, contrary to normal NTSB procedure); *Young Aff.*, at ¶ 2(f) (Bates 394) (non-governmental parties to investigation had no access to FBI witness summaries for over year).

[8] *See Sanders Aff.*, at ¶¶ 9-10 (Bates 178-79) (investigative journalist quoting TWA pilot and participant in investigation, who claims center wing tank was altered after it was recovered).

[9] *See Lahr Aff.*, Exh. 10, at ¶ 1 (Bates 370) (citing International Association of Machinists and Aerospace Workers' finding that investigation team's Cabin Documentation Group stated cabin wreckage began to disappear from hangar, and this appeared to be due to FBI; FBI never provided list of items taken, tests done or results, or whether wreckage was returned).

[10] *See Fourth Schulz Aff.*, at ¶¶ 1-13 (electronic engineer claims that radar data shows immediate descent of aircraft after explosion).

[11] *See Stalcup Aff.*, at ¶ 4 (Bates 126) (systems engineer with Ph.D. in Physics states last Riverhead data sweep shows four data points deleted from where a missile trajectory would have been located).

[12] *See First Schulze Aff.*, at ¶ 5 (Bates 467) (NTSB investigators admitted "mishandling" last one-second line of data from tape; three to four seconds eventually determined to be missing).

It appears that underwater videotapes of the debris from the plane have been altered.[13]

The government concealed the existence of missile debris field and debris recovery locations.[14] At its first public hearing, the NTSB did not permit eyewitness testimony.[15]

Many eyewitnesses vehemently disagree with the conclusions the CIA expressed in the video animation.[16] The CIA falsely reported that only twenty-one eyewitnesses saw anything prior to the beginning of the fuselage's descent into the water.[17] The FBI took over much of the investigation from the NTSB, which should have been in charge,[18] and the CIA never shared its data and calculations of the trajectory study with others for peer review, which would have been appropriate.[19]

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[13] *See Speer Aff.*, at ¶ 30 (Bates 186-87) (videotape shown had gaps in time clock, and agent refused to show unedited videotape).

[14] *See Donaldson Aff.*, at ¶ 4, Exh. 1, p. 2 (Bates 69) (Commander William S. Donaldson, a recognized aircraft crash investigator now deceased, stated that missile established a separate debris field due to extreme energy level carrying it past plane, which was captured by radar video; NTSB made no effort at recovery in area, and FBI records and maps show it was specifically looking for missile body and first stage), ¶11 14-19 (Bates 54-55), Exh. 9 (Bates 88) (map of alleged debris field); *Speer Aff.*, at ¶ 21 (Bates 186) (keel beam recovery location changed by FBI).

[15] *See Hill Aff.*, at ¶ 7, Exh. 1, p. 2 (Bates 46) (no witnesses allowed to speak at hearings); *Lahr Aff.*, at ¶ 24 & Exh. 2 (Bates 269, 306-09) (FBI objected to use of CIA video and witness materials or testimony at public hearing).

[16] *See Brumley Aff.*, at ¶¶ 1-2 (Bates 210) (representation in video isn't close to what he saw); *Wire Aff.*, at ¶¶ 2-5 (Bates 214) (what was in video did not represent what he had told agent); *Fuschetti Aff.*, at ¶¶ 1-2 (Bates 191) (pilot of other plane never saw vertical movement); *Meyer Aff.*, at ¶ 5(b) (Bates 193) (aircraft never climbed); *Angelides Aff.*, at ¶ 5 (Bates 215) (animation bore no resemblance to what he saw); *Lahr Aff.*, at ¶ 66 (Bates 277) (not aware of any witness produced by FBI, CIA or NTSB that corroborated "zoom-climb" theory).

Plaintiff also submits evidence that the government's conclusion that there was a center-wing fuel tank explosion and the government's "zoom-climb" theory were physically impossible under the circumstances.

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[17] *Donaldson Aff.*, Exh. 16 (Bates 101) (Witness Group factual report states that, of 183 witnesses who observed a streak of light, 96 said it originated from the surface).

[18] *See Speer Aff.*, at ¶ 12 (FBI took over investigation even though not qualified); *Meyer Aff.*, at ¶ 5(d) (Bates 192) (FBI would not allow NTSB Witness Group chairman to interview Meyer); *Gross Aff.*, at ¶¶ 4-5 (Bates 211) (NTSB is charged with this sort of investigation); *Lahr Aff.*, Exh. 5 (Bates 3 25-29) (Air Line Pilots Association stated that typical investigative practices such as witness interviews and photographic documentation, were prohibited or curtailed and controlled due to criminal investigative mandate), Exh. 10 (Bates 365) (trade union party to investigation was at first excluded by FBI).

[19] *See Hill Aff.*, at ¶ 3 (Bates 50) (usual to share information and assessments for peer review); *Lahr Aff.* at ¶¶ 47-48,50 (Bates 272) (flight path group should have been formed and conclusions part of public record, but party process was violated; conclusions that cannot be independently verified are not valid for accident investigation purposes); *Young Aff.* at ¶ 2(f) (Bates 394) (non-governmental parties did not participate in simulation work).

For example, evidence suggested there was no spark in the center-wing fuel tank.[20]

Once an explosion occurred, engine thrust would have been cut off with the loss of the nose of the plane.[21] Furthermore, the aviation fuel used in Flight 800 is incapable of an internal fire or explosion.[22] The zoom-climb theory is impossible because at least one wing separated early in the flash sequence.[23] Additionally, a steeper climb would likely result in a reduction in ground speed, which contradicts radar evidence.[24] In fact, Plaintiffs evidence suggests the "zoom- climb" theory is aerodynamically impossible.[25]

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[20] *See Donaldson Aff.*, Exh. 1, p. 3 (Bates 70) (no signs of metal failure on wing's scavenge pump); *Lahr Aff.*, at Exh. 10, § 4, ¶¶ 1-3 (Bates 366) (union report compiled by International Association of Machinists and Aerospace Workers found there was no spark in the center fuel tank).

[21] *See Affidavit of Lawrence Pence* (retired Air Force Colonel and Defense Intelligence Agency aide), at ¶ 6 (Bates 259).

[22] *See Harrison Aff.*, p.2, at ¶¶ 1-9 (Bates 153) (combustible liquid, as used in airplanes, is not capable of internal fire or explosion because of lack of flammable vapors in tank).

[23] *See Rivero Aff.*, at ¶ 13 (Bates 264) (center-wing tank explosion collapses wings); *Stalcup Aff.*, at ¶ 9 (Bates 120) (debris field indicates left wing damaged early in crash sequence); *Young Aff.*, at ¶J 2(a)-(b) (Bates 393) (loss of nose, and then wings, caused significant reduction in forward momentum and kinetic energy).

[24] *See Donaldson Aff.*, at ¶¶ 68, 72 (Bates 62-63) (applies principles to evidence); *Stalcup Aff.*, at ¶ 3 (Bates 126) (examines physical principles).

Finally, Plaintiff also claims that there were "military assets" conducting classified maneuvers in the area at the time of the crash, and several vessels in the area remain unaccounted for.[26]

For the purpose of determining whether Exemption 7 (C) (and other FOIA provisions) are applicable, and only for that purpose, the court finds that, taken together, this evidence is sufficient for plaintiff to proceed on his claim that the government acted improperly in its investigation of Flight 800, or at least performed in a grossly negligent fashion.

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[25] *See Hill Aff.*, at ¶ 4 (Bates 51) (airplane at more than twenty degrees inclination will stall because it will no longer produce lift); *Pence Aff.*, at ¶ 8 (Bates 259) (same); *Lahr Aff.*, at ¶ 62 (Bates 275) (plane would have stalled about one and a half seconds after nose separation); *see generally Third Lahr Aff.* (under physical characteristics concluded by government, aircraft could never have reached impact point).

[26] *See Donaldson Aff.*, at ¶ 11 & Exh. 7 (Bates 53, 85-86) (there were 25 vessels in area of crash that NTSB and Navy were unwilling to identify), at ¶ 11, Exh. 6 (Bates 82-83) (Schiliro letter, on behalf of FBI, acknowledging existence of unidentified vessel), at ¶ 11 & Exh. 7 (Bates 269, 306-09) (three naval vessels on classified maneuvers and helicopter were part of radar hits); *Perry Aff.*, at ¶ 9-12 (Bates 246) (military ship had passed close to shore earlier that day); *Hill Aff.*, at ¶ 14 (Bates 43) (one surface ship left area at 32 knots). *See also Donaldson Aff.*, Exh. 16 pp. 4-5 (Bates 99-100) (U.S. Navy P-3 was allegedly passing by, turned around, and briefly assisted in recovery efforts; P-3 had broken transponder); *Holtsclaw Aff.*, at ¶¶ 2-4 (Bates 173) (radar tape shows U.S. Navy P-3 passed over plane seconds after missile hit).

Accordingly, the public interest in ferreting out the truth would be compelling indeed.

B. Procedural Summary

On November 6, 2003, Plaintiff H. Ray Lahr filed suit against the NTSB. Thereafter he added as defendants the CIA and National Security Agency ("NSA") (together "Defendants"). Lahr is a former Navy pilot and retired United Airlines Captain who has served as ALPA's Southern California safety representative for over fifteen years. Defendants are government agencies subject to FOIA, 5 U.S.C.A. § 552. On December 17, 2003, Lahr filed a First Amended Complaint, and on February 6, 2006, Lahr filed a Second Amended Complaint ("*SAC*"). The *SAC* seeks proper identification by the Defendants of records responsive to requests that Lahr has made under FOIA, preliminary and final injunctions prohibiting Defendants from withholding the records at issue, and a mandatory injunction requiring Defendants to make certain of their computer and software programs available to Plaintiff for inspection. *SAC*, at pp. 6-7.

On August 16, 2005, the CIA moved for partial summary judgment on some redacted or withheld records found in CIA files ("First CIA Motion"). On October 18, 2005, the Court took that motion under submission without oral argument, anticipating that the motion now pending before the Court - - namely, the CIA's May 1, 2006 motion for partial summary judgment on the remaining redacted or withheld records found in CIA files ("Second CIA Motion") - - would be filed. According to the CIA, its second motion covers all CIA records not encompassed by its first motion, but without any overlap; in other words, every disputed withholding of a CIA record is challenged in one or the other of these motions. The Second CIA Motion involves twelve such records, although Plaintiff does not oppose the exemptions claimed in three of them.

On June 8, 2004, before the CIA filed its two partial summary judgment motions, the NTSB moved for partial summary judgment on all redacted and withheld records originally found in its agency files. On September 27, 2004, the Court heard oral argument, took that motion under submission and ordered those records be provided in unredacted form for *in camera* review.

Thus, the Court has three summary judgment motions to decide. Its resolution of these motions has been seriously impeded by the multiple and confusing document identification systems that the parties utilized. As the Court has been forced to note previously, the parties identified disputed documents with different, non-overlapping numbering systems, and they could not agree which documents fell within more than one reference, even after being instructed to do so by the Court.

On July 10, 2006, the Court held a hearing concerning the Second CIA Motion. As a result of glaring deficiencies in the government's *Vaughn* index, the Court thereafter ordered Defendants to submit for *in camera* review unredacted copies of several documents at issue in this motion. The Court has now reviewed those materials.

II. Discussion

A. Legal Standards

1. Motion for Summary Judgment

FOIA actions usually are resolved via summary judgment motion practice. *See Miscavige v. Internal Revenue Serv.*, 2 F.3d 366, 369 (11th Cir. 1993). Federal Rule of Civil Procedure 56(c) provides for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The moving party bears the initial burden of demonstrating the absence of a "genuine issue of material fact for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). A fact is material if it could affect the outcome of the suit under the governing substantive law. *Id.* at 248. The burden then shifts to the nonmoving party to establish, beyond the pleadings, that there is a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

"When the party moving for summary judgment would bear the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at thai. In such a case, the moving party has the initial burden of establishing the absence of a genuine issue of fact on each issue material to its case." *C.A.R. Transp. Brokerage Co., Inc. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted). In contrast, when the non-moving party bears the burden of proving the claim or defense, the moving party can meet its burden by pointing out the absence of evidence from the non-moving party; the moving party need not disprove the other party's case. *See Celotex*, 477 U.S. at 325. Thus, "[s]ummary judgment for a defendant is appropriate when the plaintiff 'fails to make a showing sufficient to establish the existence of an element essential to [his] case, and on which [he] will bear the burden of proof at trial." *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 805-06 (1999) (citing *Celotex,* 477 U.S. at 322).

When the moving party meets its burden, the "adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P 56(e). Summary judgment will be entered against the non-moving party if that party does not present such specific facts. *Id.* Only admissible evidence may be considered in deciding a motion for summary judgment. *Id.*; *Beyene v. Coleman Sec. Serv., Inc.*, 854 F.2d 1179, 1181(9th Cir. 1988).

"[I]n ruling on a motion for summary judgment, the nonmoving party's evidence 'is to be believed, and all justifiable inferences are to be drawn in [that party's] favor." *Hunt v. Cromartie*, 526 U.S. 541, 552 (1999) (quoting *Anderson*, 477 U.S. at 255). But the non-moving party must come forward with more than "the mere existence of a scintilla of evidence." *Anderson*, 477 U.S. at 252 Thus, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *Matsushita Elec. Indus. Co., Ltd. v. Zenith*

Radio Corp., 475 U.S. 574, 587 (1986) (citation omitted).

Simply because the facts are undisputed does not make summary judgment appropriate. Instead, where divergent ultimate inferences may reasonably be drawn from the undisputed facts, summary judgment is improper. *Braxton-Secret v. A.H. Robins Co.,* 769 F.2d 528, 531 (9th Cir. 1985).

2. The Freedom of Information Act (FOIA)

Under FOIA, federal agencies are required to make a broad range of information available to the public, including information regarding the agency's organization, general methodology, rules of procedure, substantive rules, general policy, final opinions, statements of policy and interpretations it adopted. 5 U.S.C.A. § 552(a). The purpose of FOIA is to protect "the citizens' right to be informed about 'what their government is up to." *United States Dep 't of Justice v. Reporters Comm. for Freedom of the Press,* 489 U.S. 749, 773 (1989) [hereinafter *Reporters Comm.*]. In deference to the "philosophy of full agency disclosure" that animates FOIA, "[t]he Supreme Court has interpreted the disclosure provisions of FOIA broadly. . . ." *Lion Raisins Inc. v. United States Dep 't of Agriculture,* 354 F.3d 1072, 1079 (9th Cir. 2004) (quotation omitted); s*ee also Dep't of the Air Force v. Rose,* 425 U.S. 352, 361 (1976) ("disclosure, not secrecy, is the dominant objective of" FOIA).

This Court has jurisdiction "to enjoin [an] agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C.A. § 552(a)(4)(B); *Kissinger v. Reporters Comm. forFreedom of the Press,* 445 U.S. 136, 150 (1980). The district court reviews *de novo* an agency's denial of requests made pursuant to FOIA. 5 U.S.C.A. § 552(a)(4)(B); *Hayden v. Nat '1 Sec. Agency/Cent. Sec. Serv.*, 608 F.2d 1381, 1384 (D.C. Ciy., 1979), *cert.denied,* 446 U.S.937(1980).

A requester may challenge an agency's response to a FOIA request in two ways: first, the requester may claim that the agency failed to make a sufficient or reasonable search of its records in response to a FOTA request, *see, e.g., Zenzanskyv. United States EnvtL Prot. Agency,* 767 F.2d 569, 571 (9th Cir. 1985) (requester claiming that agency search was "deficient"), and second, the requester may claim that the agency has claimed an exemption that does not apply to the records the agency found but withheld. *See, e.g., Favish,* 541 U.S. at 160-64.

a. Adequacy of the Agency's Search

The agency carries the burden of demonstrating that "it has conducted a search reasonably calculated to uncover all relevant documents." *Zemansky,* 767 F.2d at 571 (quotation omitted) (finding agency search adequate based on "relatively detailed" affidavits). The standard is not whether there is a possibility that undisclosed documents, responsive to a particular FOIA request, exist somewhere in the agency's records, "but rather whether the *search* for those documents was *adequate*. The adequacy of the search, in turn, is judged by a standard of reasonableness and depends. . . upon the facts of each case." *Id.* (quotation omitted; emphasis in original). The agency may use affidavits to establish that it has conducted a sufficient search of its records, but "[a]ffidavits describing agency search procedures are sufficient for purposes of summary judgment only if they are relatively detailed in their description of the files searched and the search procedures, and if they are nonconclusory and not impugned by evidence of bad faith." *Id.* at 573 (quotation omitted; alteration in original); *see also Meeropol v. Meese*, 790 F.2d 942, 952 (D.C. Cir. 1986) (noting that agency affidavits are entitled to a "presumption of good faith"). If the court determines that "the agency has sustained its burden of demonstrating that it conducted a reasonable search. . . the burden [then] shifts to the plaintiff [requester] to make a showing of agency bad faith sufficient to impugn the agency's affidavits." *Katzman v. Cent. Intelligence Agency*, 903 F. Supp. 434, 437 (E.D.N.Y. 1995) (emphasis added) (noting that in FOIA related motion for summary judgment the "facts are viewed in a light most favorable to the requester of information"). On this motion - - the Second CIA Motion - - Plaintiff does not contend that the Defendants' searches were inadequate.

b. Claims of Exemption (Generally)

An agency's withholding of documents must fall into one of nine exemptions. 5 U.S.C.A. § 552(b)(1)-(9), 552(d). In accordance with the broad disclosure provisions of FOIA, the enumerated exemptions are narrowly construed. *See, e.g., John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989), *reh'g denied*, 493 U.S. 1064 (1990). An agency must provide a requester with "[a]ny reasonably segregable portion of a record. . . after deletion of the portions which are exempt under [section 552(b)]. . . ." 5 U.S.C.A. § 552(b).

The agency seeking to withhold documents carries the burden of proving that a claimed exemption is applicable to the record or portion of the record that has been withheld. 5 U.S.C.A. § 552(a)(4)(B); *Lion Raisins*, 354 F.3d at 1079. In order to establish that it has properly withheld records, the agency may submit, or may be required to submit, a Vaughn index. *Wiener v. Fed. Bureau of Investigation*, 943 F.2d 972, 977, reh'g denied, 951 F.2d 1073 (9th Cir. 1991), *cert. denied*, 505 U.S. 1212 (1992); see *Vaughn v. Rosen*, 484 F.2d 820, 827-28 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974) ("[C]ourts will simply no longer accept conclusory and generalized allegations of exemptions . . . but will require a relatively detailed analysis in manageable segments."). A *Vaughn* index should "identify[] each document withheld, the statutory exemption claimed, and a particularized explanation of how disclosure of the particular document would damage the interest protected by the claimed exemption." *Wiener*, 943 F.2d at 977. If the *Vaughn* index is not sufficiently detailed, the court may order an *in camera* review of the withheld documents. 5 U.S.C.A. § 552(a)(4)(B); *Lion Raisins*, 354 F.3d at 1079 (citation omitted).

The CIA has withheld documents at issue in this motion under Exemptions 2, 3, 4, 5, 6 and 7(C). The Court first will review the principles underlying each of these exemptions and afterward will apply those principles to the particular records at issue.

i. Exemption 2: Internal Personnel Rules and Practices

This exemption provides that the disclosure requirements of FOIA do not apply to matters "related solely to the internal personnel rules and practices of an agency." 5 U.S.C.A. § 552(b)(2). Although, in an attenuated sense, virtually everything undertaken by a federal agency could be said to be related to the "internal personnel.. . practices of... [that] agency," not everything is "solely" related, and the "potentially all-encompassing sweep of a broad exemption. . . undercuts the vitality of any such approach." *Maricopa Audubon Soc 'y v. United States Forest Serv.*, 108 F.3d 1082, 1085 (9th Cir. 1997) (quoting *Vaughn*, 523 F.2d at 1150 (Leventhal, J., concurring)). For this reason, this exemption is construed narrowly. *See Rose*, 425 U.S. at 367-68.

The Ninth Circuit has recognized that "law enforcement materials, the disclosure of which may risk circumvention of agency regulation, are exempt under Exemption 2." *Hardy v. Bureau of Alcohol, Tobacco & Firearms*, 631 F.2d 653, 656 (9th Cir. 1980) (citation omitted). The term "law enforcement materials" is not limited to enforcement of criminal laws. *See, e.g., Dirksen v. Dep 't of Health & Human Servs.*, 803 F.2d 1456, 1459 (9th Cir. 1986) (concerning processing guidelines for Medicare program); *Ginsburg, Feldman & Bress v. Fed. Energy Admin.*, 591 F.2d 717,723-31, *aff'd en banc*, 591 F.2d 752 (D.C. Cir. 1978) (equally divided court), *cert. denied*, 441 U.S. 906 (1979) (concerning audit guidelines). In contrast to "administrative materials," which "involve the definition of the violation and procedures required to prosecute the offense," law enforcement materials involve "methods" of enforcing the laws, however interpreted. *Id* at 657. When an agency believes materials sought by a FOIA request are exempt as law enforcement materials, it must submit a detailed affidavit describing how disclosure would risk circumvention of agency regulation. *Hardy*, 631 F.2d at 657. If this explanation is reasonable, the court should find the materials exempt from disclosure unless an *in camera* examination reveals that they contain "secret law" -- i.e., a non-public interpretation or policy that governs the agency's actual practices -- or that the agency has not fairly described their contents. *Id.*

ii. Exemption 3: Materials Specifically Exempted from Disclosure by Other Statutes

This exemption provides that the disclosure requirements of FOIA do not apply to matters "specifically exempted from disclosure by statute... provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C.A. § 552(b)(3). The exemption applies only if the proffered statute falls within the scope of Exemption 3 and if the requested information falls within the scope of the statute. *Minier*, 88 F.3d at 801.

Here, Defendants have relied on two statutes to justify withholding materials under Exemption 3. The first is the National Security Agency Act of 1959, Pub. L. No. 86-36, § 6(a), 73 Stat. 63(1959), codified at 50 U.S.C.A. § 402.27[27] Section 6(a) states:

> Except as provided in subsection (b) of this section,[28] nothing in this or any other law. . . shall be construed to require the disclosure of the organization or any function of the National Security Agency, of any information with respect to the activities thereof, or of the names, titles, salaries, or number of the persons employed by such agency.

(emphasis added). The protection afforded by section 6(a) is "by its very terms absolute." *Linder v. Nat '1 Sec. Agency*, 94 F.3d 693, 698 (D.C. Cir. 1996).[29] Material within the purview of section 6(a) may be withheld under Exemption 3. *Hayden*, 608 F.2d at 1389.

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[27] Section 6(a) of the National Security Agency Act of 1959 appears only as a note to 50 United States Code Annotated section 402.

[28] Subsection (b) states that the "reporting requirements of section 1582 of title 10, United States Code, shall apply to positions established in the National Security Agency in the manner provided by section 4 of this Act." National Security Agency Act of 1959, Pub. L. No. 86-36, § 6(b), 73 Stat. 63(2006). Section 4 of the Act was repealed in 1996. See National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, tit. XVI, § 1633(b)(1), 110 Stat. 2751 (1996). Therefore, this codified "exception to the exception" was effectively eliminated even before Plaintiff submitted his first FOIA request.

[29] The Court cannot locate any decision granting disclosure of NSA records requested under FOIA and purportedly withheld under section 6(a).

The second statute Defendants invoke to support their Exemption 3 withholding is 50 United States Code Annotated section 403g which states:

> In the interests of the security of foreign intelligence activities of the United States and in order further to implement section 102A(I) of the National Security Act of 1947 that the Director of National Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure, the Central Intelligence Agency shall be exempted from the provisions of. . . any.. . law which require[s] the publication or disclosure of the organization, functions names, official titles, salaries, or numbers of personnel employed by the Agency.

Section 102A(I) of the National Security Act of 1947, 50 United States Code Annotated section 403-1(i)(1), requires the Director of National Intelligence to protect intelligence sources and methods from unauthorized disclosure.[30] Sections 401-1(i)(2) and (3) provide guidance on how to do so. Material within the purview of sections 401-1 and 403g may be withheld under Exemption 3. *Minier*, 88 F.3d at 801 (citing section 403g and predecessor to 401-1).

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[30] Section 102A(i) was enacted as part of the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 1011, 118 Stat. 3638 (2004).

iii. Exemption 4: Trade Secrets and Confidential or Commercial or Financial Information

This exemption applies to information that qualifies as "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C.A. § 552(b)(4). The terms "commercial" and "financial" retain their ordinary meaning and the term "person" includes "an individual, partnership, corporation, association, or public or private organization other than an agency." 5 U.S.C.A. § 551(2) (person); *Pub. Citizen Health Research Group v. Food & Drug Admin.*, 704 F.2d 1280, 1290 (D.C. Cir. 1983) (commercial and financial). The meaning of the term "confidential" is not so easily determined, however. [31] FOIA contains no definition and the once widely-applied test for "confidentiality" has recently been modified by the Court of Appeals for the District of Columbia, the court which initially created that test.

The original test was established by *National Parks & Conservation Ass 'n v. Morton,* 498 F.2d 765 (D.C. Cir. 1974). In *National Parks,* the appellant sought access to records of the Department of the Interior consisting of audits, annual financial statements and other financial information of companies operating concessions in national parks. *Nat'l Parks,* 498 F.2d at 770. The district court determined that the

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[31] "'[W]hether the information is of a type which would normally be made available to the public, or whether the government has promised to keep the information confidential is not dispositive under Exemption 4." *See G.C. Micro Corp. v. Def Logistics Agency,* 33 F.3d 1109, 1113 (9th Cir. 1994).

"information sought was of the kind 'that would not generally be made available for public perusal'" and declined to order disclosure. *Nat '1 Parks & Conservation Ass 'ii v. Morton,* 351 F. Supp. 404, 407 (D.D.C. 1972) (citation omitted). The Court of Appeals reversed. *Nat '1 Parks,* 498 F.2d at 771.

In interpreting the scope of the requirement that agency-withheld commercial or financial material be "confidential," the *National Parks* court was guided by the congressional understanding that the Exemption "is necessary to protect the confidentiality of information which is obtained by the Government through questionnaires or other inquiries*, but which would customarily not be released to the public by the person from whom it was obtained.*" *Nat'l Parks*, 498 F.2d at 766 (citing S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965)) (emphasis added). In light of this explanation, the Court of Appeals announced that,

> [for the purposes of Exemption 4], commercial or financial matter is confidential" . . . if disclosure of the information is likely to have either of the following effects: *(1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.*

Id. at 770 (emphasis added).

In light of the *National Parks* test, the Court of Appeals found that the district court had failed "inquire into the possibility that disclosure [would] harm legitimate private or governmental interests in secrecy" and remanded the matter to the district court "for the purpose of determining whether public disclosure of the information in question pose[d] the likelihood of substantial harm to the competitive positions of the parties from whom it ha[d] been obtained." *Nat '1 Parks*, 498 F.2d at 770-7 1 (also noting that "[s]ince the concessionaires [were] *required* to provide [the requested] financial information to the government, there is presumably no danger that public disclosure will impair the ability of the Government to obtain this information in the future" (emphasis added)).

Nearly two decades later, the Court of Appeals for the District of Columbia revisited the *National Parks* test. *See Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871 (D.C. Cir. 1992) (en banc), cert. denied, 507 U.S. 984 (1993) (hereinafter *Critical Mass*). In *Critical Mass*, the Critical Mass Energy Project ("CMEP"), a public interest organization, sought access to safety reports prepared by the Institute of Nuclear Power Operations ("INPO"), which INPO voluntarily submitted to the Nuclear Regulatory Commission ("NRC") on the condition that the NRC maintain the confidentiality of those records. *Critical Mass*, 975 F.2d at 874. Citing Exemption 4, the NRC claimed that the INPO reports contained confidential commercial information. *Id.* The panel decision granted summary judgment in favor of the NRC on the grounds that the reports were both commercial and confidential and therefore properly withheld pursuant to Exemption 4. *Id.* The Court of Appeals ordered that the case be heard *en banc*, in part "to reconsider the definition of 'confidential' set forth in *National Parks*. . . for the purposes of applying... [Exemption 4]." *Id.* at 875 (quotation omitted).

The *en banc* panel refined the *National Parks* test insofar as that test applied to information that had been voluntarily submitted to an agency, as was the information Boeing provided to the NTSB. *Id.* at 877-79. The court explained that "when information is obtained under duress [as it had been in *National Parks*], the Government's interest is in ensuring its continued reliability; [but] when that information is volunteered, the Government's interest is in ensuring its continued availability." *Id.* at 878 (emphasis added). The court noted that the distinction between voluntary and compelled information was equally salient when considering the second ("competitive injury") prong of the *National Parks* test. It reasoned that, where the production of information is compelled,

> there is a presumption that the Government's interest is not threatened by disclosure . . . and as the harm to the private interest (commercial disadvantage) is the only factor weighing against FOIA's presumption of disclosure, that interest must be significant. Where, however, the information is provided to the Government voluntarily the presumption is that the [Government's] interest will be threatened by disclosure as the persons whose confidences have been betrayed will, in all likelihood, refuse further cooperation. In those cases, the private interest served by Exemption 4 is the protection of information that, for whatever reason, "would customarily not be released to the public by the person from whom it was

> obtained... *Id.* at 878-79 (quotation omitted and emphasis added).

The *en banc* panel went on to conclude,

> Accordingly, while we reaffirm the *National Parks* test for determining the confidentiality of information submitted under compulsion, we conclude that financial or commercial information provided to the Government on a voluntary basis is "confidential" for the purpose of Exemption 4 if it is of a kind that would customarily not be released to the public by the person from whom it was obtained.

Id. at 879.

In a strong dissent, then-Judge Ruth Bader Ginsberg argued that the court was misguided in altering the standard of "confidentiality" for "all cases in which commercial or financial information is given to the Government voluntarily." *Id.* at 882 (Ginsberg, 3., dissenting). The dissent saw this alteration as "slackening" the objectivity of the *National Parks* test[32] and explained that, "to the extent that the [majority] allows [voluntary] providers to render categories of information confidential merely by withholding them from the public long enough to show a custom, the revised test is fairly typed 'subjective' and substantially departs from *National Parks.*" *Id.* at 883. Further, the dissent argued, the

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[32] Exemption 4 is "objective" in the sense that "a bare claim of confidentiality [does not] immunize agency files from scrutiny." *Bristol-Myers Co. v. Fed. Trade Comm'n*, 424 F.2d 935, 938 (D.C. Cir. 1970). Rather, it is the district court that must "determin[e] the validity and extent of the claim. . . ." *Id.*

"slackened" test for voluntary submissions was "difficult to reconcile" with the statutory mandate of FOIA to construe exemptions narrowly, because under the refined standard parties opposing disclosure are not required "to show in each case 'how disclosure will significantly harm some relevant or private governmental interest" *Id.* at 884-85 (citation omitted).

The Ninth Circuit and the majority of the other circuits adopted the initial *National Parks* test for "confidentiality," *see, e.g., Pac. Architects & Eng'rs, Inc. v. Dep't of State*, 906 F.2d 1345, 1347 (9th Cir. 1990), but the Ninth Circuit has not addressed the *Critical Mass* modification of that test for voluntarily-submitted information. *See, e.g., Frazee v. United States Forest Serv.*, 97 F.3d 367, 372 (9th Cir. 1996) (noting that because the information at issue was not voluntarily submitted to the agency, the court need not address the distinction "between voluntary and mandatory information" established in Critical Mass). However, in *Dow Jones Co., Inc. v. Federal Energy Regulatory Commission*, 219 F.RD. 167 (C.D. Cal. 2003) (Snyder, J.), the district court considered the *Critical Mass* test and rejected it in favor of adherence to the more stringent *National Parks* test. *Id.* at 177.

In *Dow Jones*, the plaintiffs sought disclosure "of [an appendix] relating to an investigation [and interviews] conducted by [the] Federal Energy Regulatory Commission (FERC) of energy production and sales at two California power plants." *Id.* at 169. The defendant claimed that disclosure of the appendix would jeopardize the government's ability to obtain like information in the future. *Id.* at 178. The district court, in large part relying on the *Critical Mass* dissent, noted that "the holding [in *Critical Mass*] is not consistent with Ninth Circuit jurisprudence, nor with the purposes of Congress in enacting FOIA, which mandates the courts to favor disclosure to serve the public interest." *Id.* The Court observed that an agreement for or a claim of confidentiality was insufficient to avoid disclosure and that if such a standard were adopted "any agency could, theoretically, simply hand out promises of confidentiality to individuals who gave information in order to avoid judicial review... ." *Id.* at 178. For these reasons, the Court held that Exemption 4 did not apply because the defendant had failed to establish that disclosure would result in a harm to the government or to a private interest. *Id.* at 179.

This Court, too, finds that the *National Parks* test is the appropriate test to be applied in circumstances, such as those here, where information has been voluntarily given to an agency. However, the "government need not show that releasing the documents would cause 'actual competitive harm.' Rather, the government need only show that there is (1) actual competition in the relevant market, and (2) a likelihood of substantial competitive injury if the information were released." *Lion Raisins*, 354 F.3d at 1079 (citing *G.C. Micro Corp.*, 33 F.3d at 1113) (finding likelihood of substantial competitive harm because the withheld documents contained commercial information provided by the requester's competitors and disclosure would allow the requester to underbid its competitors).

In the context of Exemption 4, competitive harm analysis "is. . . limited to harm flowing from the affirmative use of proprietary information by competitors. Competitive harm should not be taken to mean simply any injury to competitive position. .. ." *Pub. Citizen Health Research Group*, 704 F.2d at 1291-92 & n.30 (quotation omitted; emphasis in original) (affirming the district court's conclusion that the FDA could withhold certain clinical test information that manufacturers of intraocular lenses had been required to submit to the agency, based on a finding that disclosure of the commercial information would cause "substantial competitive injury"). Although "the court need not conduct a sophisticated economic analysis of the likely effects of disclosure[,]... [conclusory and generalized allegations of substantial competitive harm. . . are unacceptable and cannot support an agency's decision to withhold requested documents." *Id.* at 1291 (internal citation omitted).

Plaintiff argues that for any record falling under Exemption 4, the Court must apply a balancing test between the public interest in disclosure and the private interests protected by the exemption. However, Plaintiff cites no applicable precedent for this proposition. The only test the Court may apply is that found in *National Parks. See Pub. Citizen Health Research Group v. Food & Drug Admin.*, 185 F.3d 898, 904 (D.C. Cir. 1999) (*National Parks* test is the balancing test).[33]

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[33] Similarly, this Plaintiff-proposed balancing test is inapplicable to Exemption 5, discussed in the next section. There, the only test the Court may apply is whether the record is both predecisional and deliberative.

iv. Exemption 5: Privileged Inter- and Intra-Agency Communication

This exemption provides that the FOIA disclosure requirements do not apply to information that qualifies as "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C.A. § 552(b)(5). The privilege that Defendants rely on here is commonly referred to as the "deliberative process privileges which is commonly understood to "cover[] 'documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated. . . ." *Dep't of the Interior & Bureau of Indian Affairs v. Klamath Water Users Protective Ass 'n*, 532 U.S. 1, 8 (2001) (quoting *Nat'l Labor Relations Bd. v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975)) (internal quotation marks omitted in original).

In order "[t]o fall within the deliberative process privilege, a document must be. .. [1] 'predecisional' and [2] 'deliberative." *Carter v. United States Dep't of Commerce*, 307 F.3d 1084, 1089-91 (9th Cir. 2002) (citation omitted) (holding that statistically adjusted census data which had not been released as official 2000 Census numbers was neither predecisional nor deliberative). "A document may be considered predecisional if it was 'prepared in order to assist an agency decisionmaker in arriving at his decision.'" *Assembly of the State of California v. United States Dep't of Commerce*, 968 F.2d 916, 921 (9th Cir. 1992) (en banc) (hereinafter *Assembly*) (citation omitted), as amended on *denial of reh'g* (Sept. 17, 1992). A predecisional document "may include 'recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency[.]'" *Id.* at 920 (citation omitted). A predecisional document is "deliberative" if the "disclosure of [the] materials would expose an agency's decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions." *Id.* at 921 (quotation omitted; alteration in original). Although early cases "contrasted 'factual' and 'deliberative' materials," that distinction has lost strength. *Id.* at 921. Now, "[t]he key inquiry is whether revealing the information exposes the deliberative process. The factual/deliberative distinction survives, but simply as a useful rule-of-thumb favoring disclosure of factual documents, or the factual portions of deliberative documents where such a separation is feasible." *Id.* (internal citation omitted). If the release of factual data would "enable the public to reconstruct any of the protected deliberative process" it may properly be withheld by the agency. *Id.* at 922-23.

v. Exemption 6: Protection of Personal Information Contained in Personnel, Medical, or Similar Files[34]

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[34] In their Reply on the current motion, Defendants state: When plaintiff responded to the First CIA Motion, he did not oppose the use of Exemption 6 or, in the alternative Exemption 7(C) to withhold, from the records covered by the First CIA Motion, the names of FBI agents or of eyewitnesses to the explosion of TWA Flight 800 Changing his position, he now

Under this exemption, an agency may properly withhold documents that are "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C.A. § 552(b)(6). "Congress' primary purpose in enacting Exemption 6 was to protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *United States Dep't of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982).

For purposes of Exemption 6, a "file" is a compilation of agency records. James T. O'Reilly, 2 Federal Information Disclosure § 16:3 (3d ed. 2005). "Records" includes "all books, papers, maps, photographs, machine readable" materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business." 44 U.S.C.A. § 3301; see *Fors Ham v. Harris*, 445 U.S. 169, 183(1980) (adopting section 3301 definition of "records" because FOIA does not define term).

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alleges that he does contest the use of the above exemptions to withhold, from those records, the names of FBI agents and eyewitnesses.

Def Reply, at p. 16 n.2. Defendants claim Plaintiffs earlier statement should be treated as a binding waiver. *Id.* (citing *United States v. Olano*, 507 U.S. 725, 733 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). Without determining at this point whether the earlier statement operates as a binding waiver concerning documents which are at issue in the previously-filed motions, the Court finds it does not preclude Plaintiff from contesting these exemptions with regard to documents at issue in the present motion.

Examples of records whose release might invade individuals' privacy include arrest records, discipline records, passport or Social Security numbers, job performance records, union membership cards, and the like. *See* James T. O'Reilly, 2 Federal Information Disclosure § 16:16 (3d ed. 2006). Moreover, it is conceivable that in certain situations, the release of an individual's name, in and of itself, would violate his or her privacy interest, although such disclosure is not inherently a significant threat to an individual's privacy. *Nat'l Ass'n of Retired Fed. Employees v. Homer*, 879 F.2d 873, 877 (D.C. Cir. 1989).

To determine whether a document, or portion thereof, was properly withheld under Exemption 6, a court must balance the privacy interest protected by Exemption 6 against the "the public interest in disclosure." *United States Dep't of Defense v. Fed. Labor Relations Auth.*, 510 U.S. 487, 495 (1994) (quotation omitted). The agency seeking to withhold information has the burden of establishing "the significance of the privacy interest at stake." *United States Dep't of State v. Ray*, 502 U.S. 164, 176 (1991) (finding that release of the names and addresses of Haitian interviewees in conjunction with highly personal information regarding marital and employment status would constitute a "significant" invasion of privacy). The public interest in disclosure "focuses on the citizens' right to be informed about 'what their government is up to.' Official information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose." *Id.* at 177-78 (citation omitted; emphasis in original).

vi. Exemption 7(C): Records or Information Compiled for Law Enforcement Purposes

Under Exemption 7(C), an agency may properly withhold "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information... could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C.A. § 552(b)(7)(C). Exemption 7(C) may not be used when an agency does not have the law enforcement power to conduct an investigation. *See Weissman v. Cent. Intelligence Agency*, 565 F.2d 692, 696 (D.C. Cir. 1977).

Because of their similar language, Exemption 7(C) is often closely associated with Exemption 6. However, Exemptions 7(C) and 6 "differ in the magnitude of the public interest that is required to override the respective privacy interests protected by the exemptions," the former being more protective of privacy than the latter. *Dep't of Defense,* 510 U.S. at 496 n. 6. Exemption 7(C) applies to any disclosure that "could reasonably be expected to constitute' an invasion of privacy that is 'unwarranted,' while Exemption 6 bars any disclosure that 'would constitute' an invasion of privacy that is 'clearly unwarranted." *Id.* (emphasis added).

In *Department of Defense,* the Supreme Court held that an employer-agency's disclosure of its employees' home addresses to the employees' collective bargaining representative would constitute a clearly unwarranted invasion of personal privacy under Exemption 6. 510 U.S. at 489. In reaching that conclusion, the Supreme Court noted that while *Reporters Committee, supra*, turned on Exemption 7(C), not Exemption 6, the two exemptions overlap to the extent that "the dispositive issue. . . is the identification of the relevant public interest to be weighed in the balance, not the magnitude of that interest." *Id.* at 496 n. 6 (emphasis in original).

As the Court noted in Section I (A)(2), above,

> where there is a privacy interest protected by Exemption 7(C) and the public interest being asserted is to show that responsible officials acted negligently or otherwise improperly in the performance of their duties, the requester must establish more than a bare suspicion in order to obtain disclosure. Rather the requester must produce evidence that would warrant a belief by a reasonable person that the alleged government impropriety might have occurred.

Favish, 541 U.S. at 174. There is a presumption of legitimacy accord to a government official's conduct, *id.* (citing *Ray*, 502 U.S. at 178-79), and the evidence must be sufficient to overcome it.

B. Analysis

1. The Adequacy of the NTSB's Search

In this motion, Defendants do not move for summary judgment that their search was adequate, although they did so in the still-pending previous summary judgment motions.

2. Claims of Exemption

Defendants have moved for summary judgment as to twelve documents not addressed by their earlier motions for partial summary judgment.

a. Exemptions Claimed and Not Contested by Plaintiff

Defendants moved for summary judgment that the CIA properly invoked the claimed exemptions to withhold or redact information in the records identified by MORI Document ID numbers 1255551, 1255553 and 1255555. Plaintiff does not contest the use of these exemptions. For this reason, the Court GRANTS summary judgment to Defendants as to these uncontested documents.

b. Exemption 4 (Confidential Commercial Information): MORI Document ID# 1305302 and Plaintiff's Record 12

In two documents - - one identified by the Government as MORI Document ID# 1305302 and the other by Plaintiff as Record 12[35] - - the CIA has redacted information provided by Boeing for use in the investigation of the crash of Flight 800, claiming it may be withheld under Exemption 4. Plaintiff challenges these redactions, arguing that their release would not cause Boeing substantial competitive harm.

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[35] Plaintiff's Record 12 can also be identified by MORI Document ID # 1255554. This record also contains other contested redactions under Exemptions 6 and 7(C), which are addressed in the next section of this Order.

To assist in the crash investigation, Boeing voluntarily provided information to the CIA and NTSB. *Third Buroker Decl.* at ¶ 10. This material apparently relates to "flight characteristics and performance of a Boeing 747, for example, lift coefficient, drag coefficient and pitching moment coefficient data." *Id.* Boeing has stated that this information, which concerns the Boeing 747-100, is confidential and proprietary and it has detailed the "substantial competitive harm" disclosure allegedly would cause. *Buroker Decl.*, at ¶ 35. *See generally Breuhaus Decl.* Furthermore, Boeing claims that it would "be forced to reconsider" providing information such as this in the future, if the information is disclosed in this case. *Second Breuhaus Decl.* at ¶ 14.

Plaintiff does not dispute that, for purposes of FOIA, the information provided by Boeing and withheld by Defendants qualifies as commercial or financial information obtained from a person. Whether it is confidential is the question.

MORI Document ID # 1305302[36] consists of two "pages of tabular data from or relating to JFK and

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[36] The June 22, 2006 Declaration of John Clarke, Plaintiffs counsel, did not contain arguments in opposition to summary judgment which cited to MORI Document ID # 1305302. However, it did contain opposition to MORI Document ID # 1215200, which Plaintiff split in two and designated as Records 14 and 45. MORI Document ID# 1215200 and 1305302 are, at the least, substantially similar, and the redacted pages appear to be duplicates of each other. For this reason, in a conference following a hearing in this matter on July 10, 2006, both parties'

ISP radars and nine pages of graphs (preliminary), containing handwritten annotations and relating to technical characteristics, e.g., lift coefficient, drag coefficient and pitching coefficient." *Third Buroker Decl.*, at p. 5. Three pages of graphs are redacted in hill; the remaining six graphs that were (released appear to consist of plotted data points and simulation results.

Plaintiff's Record 12 is a six-page email dated April 29, 1997. The *Vaughn* index describes it as "addressing points raised by a FBI special agent concerning CIA analysis and conclusions during interagency coordination." The sender and recipient are not identified on the portion that was released. Nor are the initials of various witnesses who are mentioned. From the third page of the released portion of the email, the CIA also redacted slightly more than one line of text. Plaintiff posits that this redaction concerns "wing tip separation under G-load," evidently basing this assumption on the immediately preceding text of the email.

The Court has reviewed the email (MORI Document ID # 1255554 and Plaintiff's Record 12) and the radar graphs (MORI Document ID # 1305302) in their entirety, both having been filed *in camera* and under special seal. Applying the *National Parks* test, the

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counsel stipulated that Plaintiff's arguments in opposition to summary judgment for MORI Document ID # 1215200 shall also apply to MORI Document ID# 1305302. Because Plaintiff's Record 14 contains the three pages found in MORJ Document ID# 1305302 and redacted under Exemption 4, the Court will consider Plaintiff's arguments found in his response to Record 14 as they relate to the redactions within MORI Document ID# 1305302.

Court finds that Defendants have not proffered evidence sufficient to meet their burden to show that release of this information likely would impair the government's ability to obtain comparable necessary information in the future. Indeed, they do not argue that it would. Simply because Boeing speculates that it would reconsider its policies of providing information such as this to the government is, by itself, not enough.

The parties disagree whether the disclosure of this information would cause Boeing substantial competitive harm. Defendants maintain that this and other Boeing-provided information is confidential commercial information that has "independent economic value to Boeing because [it is] not freely ascertainable or publicly available for use by other parties." *Breuhaus Decl.* at ¶ 6, 8. The 747 Classic[37] was first developed in the 1960s. *Id.* at ¶ 13. From the point of view of aircraft and computer technology, that distant era was relatively unsophisticated. Now, more than forty years later, aircraft design and manufacture ha been modified and refined to a level not only strikingly different, but undoubtedly far superior. This proposition requires no further elaboration. One may therefore reasonably conclude that a one-line reference to this once-confidential information in Plaintiff's Record 12 (MORI Document ID# 1255556) has little or no remaining commercial value insofar as aircraft design is concerned. The same is true of the withheld graphs.

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[37] The 747-100, 747-200, and 747-300 are aerodynamically similar and the series is known as the "747 Classic." *Breuhaus Decl.* at ¶ 11.

Nevertheless, Defendants maintain, the deleted information retains independent economic value due to its use in flight simulators. Boeing invested several million dollars in compiling this data, and it licenses the data for use in proprietary flight simulators for flight training, engineering and other commercial purposes. *Id.* at ¶¶ 7, 13.[38] Sometimes, these licensees are in direct competition with Boeing. *Id.* A flight simulator data package license for the 747 Classic costs approximately $1 million.[39] *id.* at ¶ 22. Additionally, Boeing claims that no other company has invested the resources to reproduce its training simulator database. *Id.* at ¶ 16. Boeing competes with other companies in providing flight training, aircraft certification and engineering services through its training simulator database, but enjoys a competitive advantage due to its status as the "sole source" of the training simulator data.[40] *Id.* at ¶ 18. A competitor attempting to reproduce this data and sell its own version of the data package would need to make an investment of $10 & $20 million in developmental costs, claims Boeing, and Boeing is aware of no other company that has done so. *Id.* at ¶1 15-16.

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[38] In their Reply, Defendants contend that Boeing also plans to release a new line of 747 commercial transport aircraft in 2009. *See Third Glass Decl.* at 2, Exh. A. However, they fail to show how the release of this information will cause competitive injury to Boeing's sale of these aircraft, to simulator business concerning these aircraft, or otherwise.

[39] Since 1991, Boeing has sold ten 747 Classic simulator data package licenses to third parties, the most recent having been sold in 2001. *Breuhaus Decl.* at ¶ 22.

[40] A wholly owned subsidiary of Boeing operates flight training for the 747 Classic using these simulators. *Breuhaus Decl.* at ¶ 19. Revenue for these services in 2003 was approximately $7 million. *Id.* at ¶ 20. Boeing also offers engineering services that allow owners and operators of 747 Classic aircraft to secure "Airworthiness Certificates" for modified 747s. No financial information regarding these engineering services was set forth in the NTSB's submissions.

In response, Plaintiff contends that the data in these records can be independently obtained through the use of computational fluid dynamics ("CFD"). CFD computer programs are used in the aerospace industry to calculate and simulate aircraft performance. *Hoffstadt Aff* (Sept. 8, 2005), at ¶¶ 4-6.[41] CFD computer programs can be used to model three dimensional models of arbitrary aircraft configurations and can calculate "airflow, pressure, forces, and moments of such shapes. .. ." *Id.* at ¶ 4. One such program, called VSAERO, is sold by Analytical Methods, Inc. ("AMI"), for $27,500. *Id.* at ¶ 6. AMI also sells the geometry of the 747-200 and the 747-300 for use with VSAERO for $5,000. *Id.* Using VSAERO, in conjunction with this geometry, one can replicate the type of aerodynamic data contained in the withheld records. *Id.* at ¶ 27. Plaintiff's expert, Hoffstadt, states that these records cannot be considered trade secrets because the same information can be obtained from the CFD model with a high degree of precision. *Id.* at ¶ 9, 17. Hoffstadt further states that (1) the number of Classic 747s in service continues to drop, lowering the market for these services, and Boeing ceased any new deliveries in 1990; (2) it is unclear to what extent, if any, release of this data would enable a competitor to develop such a package without still having to incur the full amount of Boeing's claimed development costs; and (3) Boeing has not sold any licenses for four years. *Id.* at ¶¶ 29-30, 34, 43.[42] Furthermore, Hoffstadt notes, any competitor would still have to obtain approval and certification from each applicable national aviation regulatory agency, and to do so the competitor would have to present actual flight test data. Boeing has not previously released such data and it would not be required to do so as a result of this motion. *Id.* at ¶¶ 39-40.

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[41] Hoffstadt is an aerodynamicist who apparently was employed as a technical specialist in the Aerodynamics Group at Boeing from 1997 through 2002. *Hoffstadt Decl.* (Oct 20, 2002), at ¶ 4.

In *Greenberg v. Food & Drug Administration*, 803 F.2d 1213 (D.C. Cir. 1986), an attorney with the Public Citizen Health Research Group requested that the FDA disclose lists of names of customers who had purchased a particular manufacturer's CAT scanners. *Id.* at 1214. The FDA withheld the requested information as "confidential commercial information," save that which had already been disclosed in a newspaper article. *Id.* The district court granted summary judgment to the manufacturer, but the Court of Appeals reversed. The court explained that when "requested information is available at some cost from an additional source, the court must analyze (1) the commercial value of the requested information, and (2) the cost of acquiring the information through other means." *Id.* at 1218 (quotation omitted). The court concluded that summary judgment was not appropriate because both the cost and availability of the information was contested. *Id.*; *see also Worthington Compressors, Inc. v. Costle*, 662 F.2d 45 (D.C. Cir. 1981) (holding that summary judgment was inappropriate where the issue of the feasibility of reverse engineering was disputed).

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[42] Defendants and Boeing reply that CFD programs *cannot* reproduce aircraft aerodynamics data to the level of accuracy required for all of the commercial purposes for which Boeing and third parties use the data. *Breuhaus Decl.* at ¶ 10.

For purposes of the pending motion, the Court is required to draw inferences in Lahr's favor. *See Painting Indus. of Hawaii Mkt. Recovery Fund v. United States Dep't of the Air Force*, 751 F. Supp. 1410, 1415 (D. Haw. 1990), *rev'd on other grounds,* 26 F.3d 1479 (9th Cir. 1994) (summary judgment denied when contrary affidavits show factual dispute about whether release of records would harm competitive position of company). The Court therefore assumes that CFD programs, alone, can reproduce the aerodynamics data of the Classic 747s to the level necessary for the simulation software, as stated by Hoffstadt.

Because Defendants have failed to establish a likelihood that release of this information will cause Boeing substantial competitive harm, the Court DENIES summary judgment as to the graphs withheld from the record constituting MORI Document ID# 1305302, for which Exemption 4 is Defendants' sole basis for withholding this record. As to Plaintiff's Record 12, the Court also DENIES summary judgment to Defendants as to the portion of that email that defendants claim is exempt under Exemption 4.

c. Exemptions 6 and 7(C) (Privacy Redactions): Plaintiff's Records 48 and 12

In two records - - Plaintiff's Records 48 and 12, which Defendants identified and referred to as MORI Document ID# 1255552 and 1255554, respectively - - the CIA redacted eyewitness identification numbers and the names of eyewitnesses to the crash of Flight 800, claiming both Exemptions 6 and 7(C). Defendants claim that the CIA withheld these names and numbers at the request of the FBI. *Third Buroker Decl.* at ¶ 9. Preliminarily, both records are emails that qualify as "similar files" under Exemption 6. *Washington Post Co.*, 456 U.S. at 600-02.

Record 48 is entitled "Response to DIA Concerns on TWA 800 Findings." The document redacts the names of six witnesses whose observations concerning the sight and sound of the crash contradict the CIA's ultimate conclusion of how the crash occurred, but it does contain the CIA's unredacted responses to their observations.

As noted above, Record 12 is a six-page email which addresses "points raised by a FBI Special Agent concerning the CIA analysis and conclusions during interagency coordination." This document was released in part, with 28 redactions[43] invoking Exemptions 3, 5,6 and/or 7(C).[44] Plaintiff contests only twelve redactions, one under Exemption 4 (discussed above) and the rest under Exemption 6 and 7(C)."

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[43] Plaintiff erroneously states there were 27 redactions, but apparently missed one. The Court's analysis encompasses the missed redaction.

[44] Plaintiff lists twelve challenged redactions - - redactions 6-9, 11-18 and 21-22 - - but redaction 6 does not concern

Plaintiff challenges redactions 7-9, 11-18 (including I 2A) and 21-22. To the extent that Plaintiff does not challenge the other redactions, such as those claimed to be CIA "assets," I GRANT summary judgment to Defendants.

Preliminarily, the Court finds (because a balancing test is in order) that the crash of Flight 800 and the government's investigation and findings are matters of great public interest.

i. *Privacy Redactions under Exemption 6*

To determine if information should be exempted from disclosure under Exemption 6, a court must balance the privacy interests protected by that exemption against the "the public interest in disclosure." *Fed. Labor Relations Auth.*, 510 U.S. at 495. The "only relevant 'public interest in disclosure' . . . is the extent to which disclosure would serve the 'core purpose of the FOIA,' which is 'contributing significantly to *public understanding of the operations or activities of the government.*'" *Id.* (quoting *Reporters Comm.*, 489 U.S. at 775) (emphasis in original). The privacy interest, meanwhile, "encompass[es] the individual's control of information concerning his or her person."

Exemptions 6 or 7(C). At the same time, however, Plaintiff failed to assign a number to a redaction concerning Exemptions 6 and 7(C) - - found between redactions 12 and 13 - - which the Court will consider challenged and refer to as 12A. Thus, the Court must address twelve challenged redactions after all.

Fed. Labor Relations Auth., 510 U.S. at 500 (quoting *Reporters Comm.*, 489 U.S. at 773) (alteration in original).

Plaintiff argues that no privacy interests are involved in the release of eyewitness identification numbers, and any withholding of eyewitnesses is subject to the balancing test described above.

Defendants have not established a protectable privacy interest that would be implicated by the release of witness identification numbers. The privacy interest to which they point is that these persons have an "interest in not being subjected to unofficial questioning about the analytic project or investigation at issue and in avoiding annoyance or harassment in their. . . private lives." *Buroker Decl.* at ¶ 46. Defendants do not explain how the disclosure of witness identification numbers, alone, could provide access to these individuals or any personally identifying information about them. Furthermore, the identification numbers are not personal information of a nature ordinarily protected by the courts under Exemption 6, such as social security numbers or personnel records. *See* James T. O'Reilly, 2 Federal Information Disclosure § 16:16 (3d ed. 2006). For this reason, the Court finds that Defendants have not raised sufficient privacy interests in the identification numbers and DENIES summary judgment on that ground.

As to these eyewitnesses' names, the burden is on Defendants to show that disclosure "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C.A. § 552(a)(4)(B), 552(b)(6); *Lion Raisins*, 354 F.3d at 1079. Defendants have not met their burden of establishing "the significance of the privacy interest at stake." *Ray*, 502 U.S. at 176. The required "particularized explanation," *see Wiener*, 943 F.2d at 977, is absent in both the *Vaughn* index and the accompanying affidavits, although the *Third Buroker Declaration* does cite to Buroker's previous conclusory assertion that those witnesses have an interest in "not being subjected to unofficial questioning about the . . . investigation at issue and in avoiding annoyance or harassment in their official, business, and private duties." *Buroker Decl.*, at ¶ 46 (cited in *Third Buroker Decl.*, at ¶ 9).

The cases under Exemption 6 that have found privacy interests in witnesses' names, separate and apart from other personal information, typically involved witnesses in criminal or quasi-criminal cases; the disclosure of their identity might compromise the case or endanger them. *See, e.g., Balderrama v. United States Dep't of Homeland Sec.*, 2006 U.S. Dist. LEXIS 19,421, at *25 (D.D.C. Mar. 30' 2006) (unpublished). In *United States Department of Defense v. Federal Labor Relations Authority*, the Court found a "nontrivial" privacy interest in nondisclosure of home addresses due to wishes of federal employees to avoid unwanted contact at home. 510 U.S. at 500-01. However, in that case the employees made an affirmative decision not to provide their home addresses to the union. *Id.* Here, the disclosed records would consist of names, not addresses. Defendants proffer no assertions by any of the eyewitnesses, even *in camera*, that they wish to avoid being asked for information. Even assuming these individuals ultimately were contacted, if they were not interested in responding to inquiries, they could easily decline to be interviewed. Therefore, the consequences arising from disclosure appear slight.

On the other hand, disclosure of these persons' identities ultimately could contribute significantly to the "public understanding of the operations or activities of the government." *Fed. Labor Relations Auth.*, 510 U.S. at 495 (quotation omitted). Plaintiff is trying to contribute significantly to the public's knowledge of what he contends is a massive cover-up by the government of a missile strike on Flight 800. To be sure, Plaintiff already is privy to the government's versions of the accounts these individuals allegedly provided to investigators concerning what they saw, insofar as such information was set forth in the records adjacent to where their names would have appeared had they not been redacted. Disclosure might nevertheless assist Plaintiff in investigating and uncovering government malfeasance by, for instance, leading to individuals who might repudiate what the government attributed to them or might even declare that the government misused or misrepresented the information they provided.

The Court concludes that the balance favors disclosure - - the release of the eyewitnesses' names would not constitute a clearly unwarranted invasion of privacy. Therefore, the Court DENIES Defendants' claims concerning the names of eyewitnesses based upon Exemption 6.

ii. Privacy Redactions under Exemption 7(C)

Defendants also claim that the names of eyewitnesses and the eyewitness identification numbers - - the same names and numbers contested under Exemption 6 - - should be exempted from disclosure based upon Exemption 7(C). To the extent the issue at hand is the magnitude of the public interest to be weighed in the balance, the privacy interest protected by Exemption 7(C) is greater than that protected by Exemption 6, *Reporters Comm.*, 489 U.S. at 756 - - assuming Exemption 7(C) is applicable in the first place.

For Exemption 7(C) to apply, the record must be compiled for "law enforcement purposes." Paragraph three of the *Third Buroker Declaration* states: "As indicated in note 5 of my June 20, 2005 declaration, CIA's analytical effort was limited in scope. At the request of the FBI, the focus of the CIA inquiry on TWA Flight 800 was to determine what the eyewitnesses saw, not what happened to the aircraft" (emphasis added). Note 5 of the *First Buroker Declaration* does not illuminate how the CIA's analytic effort was limited in scope and does not explain the relationship between the CIA and FBI during this process. Buroker apparently meant to point to paragraph 50 of his earlier declaration, which states:

> The information at issue in this case was clearly compiled for law enforcement purposes. The possibility that the explosion of TWA Flight 800 with the loss of all 230 passengers and crew on board may have been the result of a criminal act precipitated what was at that time the most expensive criminal investigation in U.S. history. Of particular concern to FBI investigators were the reports they compiled from dozens of eyewitnesses who reported seeing. . . a "flare or firework" ascend and

> culminate in an explosion. Thus, it was as part of this investigation that the FBI requested the assistance of CIA weapons analysts in determining what these eyewitnesses saw.

Buroker Decl. at ¶ 50. The FBI furnished eyewitness reports to the CIA for this analysis. *Third Buroker Decl.* at ¶ 5.

To determine whether a record is compiled for law enforcement purposes, the court applies a two-part test. An "agency may only invoke Exemption 7 if: (1) the records were created as part of an investigation related to the enforcement of federal laws and (2) that investigation was within the agency's law enforcement authority." *Whittle v. Moschella,* 756 F. Supp. 589, 593 (D.D.C. 1991) (citing *Pratt v. Webster*, 673 F.2d 408, 420-21 (D.C. Cir. 1982)). "The investigation need not result in an arrest or indictment, and the FBI's authority to conduct an investigation can rest on a plausible basis to believe that the law has been violated." *Whittle*, 756 F. Supp. At 593 (citing *King v. United States Dep't of Justice*, 830 F.2d 210, 230-31 (D.C. Cir. 1987)). Here, the CIA may invoke the law enforcement exemption on the FBI's behalf, because it was the FBI that compiled these eyewitness names and statements.

Like Exemption 6, Exemption 7(C) requires a balancing of "the competing interests in privacy and disclosure." *Favish*, 541 U.S. at 172. Defendants' asserted privacy interests in individuals' names are the same as those asserted with respect to Exemption 6, above. Exemption 7(C)'s broad privacy rights generally concern criminal or quasi-criminal investigations where those identified may be subject to embarrassment, reputational harm, or worse. *See, e.g., SafeCard Servs. v. Sec. & Exch. Comm'n*, 926 F.2d 1197, 1205 (D.C. Cir. 1991). Although this privacy interest is broader than that of Exemption 6, under these facts, the public interest in uncovering agency malfeasance and wrongdoing outweighs it.

Therefore, to the extent Plaintiff challenges Defendants' redactions, I DENY the motion for summary judgment as to Plaintiffs Records 48 and 12 in full.

d. Exemption 5 (Deliberative Process Privilege): Plaintiffs Records 66, 76, 77 and 78

Defendants move for summary judgment based on Exemption 5 on Plaintiffs Records 66, 76, 77 and 78. All four of these records are NTSB files found in CIA records, and all four, to varying degrees, contain factual material that Defendants maintain is exempt from disclosure because it is organized in a deliberative manner. These "facts" range from organized radar data to graphs of simulations based upon this data. Plaintiff argues that they may not be redacted because facts, without more, do not reveal the deliberative process of an agency.

In the Ninth Circuit,

> the scope of the deliberative process privilege should not turn on whether we label the documents "factual 'as opposed to "deliberative" . . . Factual materials [are] exempt from disclosure to the extent that they reveal the mental processes of decisionmakers. . . In other

> words, whenever the unveiling of factual materials would be tantamount to the 'publication of the evaluation and analysis of multitudinous facts' conducted by the agency, the deliberative process privilege applies.

Nat'l Wildlife Fed'n v. United States Forest Serv., 861 F.2d 1114, 1119 (9th Cir. 1988) (citations omitted). The Ninth Circuit has provided examples of factual materials considered both deliberative and non-deliberative. On one hand, the court in *National Wildlife Federation* held that the United States Forest Service had properly withheld draft Forest Plans and draft Environmental Impact Statements under the deliberative process privilege, because the materials "represent[ed] the mental processes of the agency in considering alternative courses of action prior to settling on a final plan." *Id.* at 1122 (noting that "[m]aterials that allow the public to reconstruct the predecisional judgments of the administrator are no less inimical to [E]xemption 5's goal of encouraging uninhibited decisionmaking than materials explicitly revealing his or her mental processes.").

On the other hand, in *Assembly of the State of California*, the Ninth Circuit held a computer tape containing adjusted census data was neither predecisional nor deliberative and could not be withheld under exemption 5. *Assembly*, 968 F.2d at 917. The court found that release of this factual material would not enable the public to reconstruct the formulas used by the Census Bureau to generate the adjusted census data. *Id.* at 922. The court also found the deliberative process of the agency had already been revealed. *Id.* at 923.

i. Plaintiffs' Records 66 and 78

Plaintiff's Record 66 (also NTSB Record 33 and MORI Document ID# 1147380) is a nine-page document presenting "preliminary radar data" that, Defendants state, "provided a starting point for the simulations of the aircraft's flight path." *See Moye Supp. Decl.* at ¶ 6(a). Defendants claim that "[t]he author culled these data from an enormous collection of radar returns to contribute to die flight path derived from the simulations." *Id.* Defendants argue this information is predecisional and deliberative, and distilling the "significant facts from the insignificant" constituted an exercise of judgment. *Id.*

Plaintiff's Record 78 (also NTSB Record 36) is a sixty-two page document presenting "preliminary radar data" that, Defendants state, also "provided a starting point for the simulations of the aircraft's flight path." See *Id.* at ¶ 6(d). Defendants make the same claim that they did as to Record 66 as to its supposed predecisional and deliberative nature. *Id.*

According to Defendants, a "staff member of the NTSB created the information represented on [both Records 66 and 78] to present some preliminary radar data." *Id.* at pp. 62, 115.

As to whether Records 66 and 78 are predecisional, Defendants do not present evidence, but merely imply that they were, in that they were used to compile the final Aircraft Accident Report. *See* Second CIA Mot'n, at pp. 11-12. Plaintiff argues that the records are not predecisional in that they post-date the CIA video animation, which was broadcast on November 17, 1997. Record 66 has several handwritten dates ranging from November 12, 1997 to December 16, 1997 (with two undated pages). The first page of Record 78 contains a handwritten date of November 12, 1997; no other pages are dated. The CIA video animation surely has the status of a final agency decision, but that does not mean it was the only final agency decision; the August 23, 2000 NTSB Aircraft Accident Report also is a final agency decision, and to the extent that it does not expressly incorporate the earlier CIA findings, further work on the matter after the November 17, 1997 broadcast would be predecisional. That said, because Defendants have not directly presented evidence that these data sets were used in preparing the final Aircraft Accident Report -- conclusory stating that they were "preliminary" is not enough -- summary judgment would not be appropriate.

As to whether Records 66 and 78 are deliberative, Defendants state that the preliminary data "is reflected in the Airline Performance Study and) or the data supporting the Study and the data that matches the publicly available data has been released." *Id.* The headings were released, but handwritten notes and preliminary data have been redacted. *Id.* at pp. 62, 115. Defendants argue that the "selection of these data culled from hundreds of pages of data give an indication of the preliminary thoughts of how data may be used in the simulation program." *Id.* at pp. 63, 116. In other words, Defendants essentially argue that the release of this data would reveal the deliberative process, because some staff member selected this specific data for a reason.

Defendants attempt to explain how disclosure of this data might harm the decision-making process of the

NTSB by conclusory stating that "without the protection provided by the exemption, full and frank discussion of options and opinions so vital to the decision-makers would be impossible." *Id.* at pp. 63, 116 (citing *Crider Decl.* at ¶¶ 31-32). The Crider Declaration basically contains only tautological support for this proposition, not an explanation or description of the communicative or evaluative procedures the NTSB followed in doing its "culling." Nor does Crider demonstrate why disclosure of what the report did not incorporate would impede other or future deliberations. Simply stating that this data provided a "starting point" for the simulations of the aircraft flight path is not enough. Instead, the agency must show that the deliberative process (or at least part of it) can be determined from the data alone. *Carter*, 307 F.3d at 1091. Thus, for example, information about how data was evaluated, by whom, and how differing views or results were communicated within the investigative team might have established a stronger basis for defendants' claim of exemption.

Defendants have failed to carry their burden that what has been withheld "represent[ed] the mental processes of the agency in considering alternative courses of action prior to settling on a final plan." *Nat'l Wildlife Fed'n*, 861 F.2d 1122. Defendants' contention would invite agencies to claim that the mere notion that one set of facts was culled from a larger set of facts always and necessarily renders the culled material evidence of the agency's deliberative process.[45]

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[45] To the extent there are handwritten notes found on Records 66 and 78, even Plaintiff does not dispute their

ii. Plaintiff's Record 76

Defendants also move for summary judgment on Plaintiff's Record 76. This record (also designated as NTSB Record 34 and MORI ID# 1147382[46] is a twenty-nine-page document that graphically depicts "various versions of the radar data" provided by the Federal Aviation Agency. *See Moye Supp. Decl.* at ¶ 6(b). Defendants released twenty-five pages in lull, and redacted four. *Id.* Defendants state that the charts "illustrate staff's coordination of various types of data, such as this radar data, used to prepare and/or update evaluations of the accident flight." *Id.* They argue that the data reflects "the personal opinion of the writer [presumably meaning the creator of the graphs] rather than the policy of the agency." *Id.* at p. 74. Plaintiff again argues that this data is factual, does not reflect the personal opinion of the compiler and therefore is not covered by the deliberative process exemption.

These graphs typically consist of grids on which entries have been placed in the form of various symbols. Some contain what literally appear to be lines connecting dots. There is accompanying text that explains the symbols. To a layman, there do not appear to be any differences between the redacted

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presumptive deliberative character. However, because in any event Defendants have not shown that these records are "predecisional," they must still be produced in their entirety.

[46] Both this record and Plaintiffs Record 77/NTSB Record 35 share MORI ID# 1147382. The parties, persistently disorganized and indifferent to the impact of sowing confusion, offer no explanation for this overlap.

and unredacted pages in either their format or appearance.

First, Defendants do not present evidence that the withheld portion of this record or the record in its entirety is predecisional. The date of the document is "unknown," *Id.* at p. 74, and it is unclear in what manner, exactly, the document was used. Defendants merely suggest that it helped lead to the final NTSB report and conclusions because it was "used to prepare and/or update evaluations of the accident flight." *Id.* at ¶ 6(b).

Second, Defendants have not shown that this record is deliberative. As with Records 66 and 78, the data contained within these graphs is purely factual. There appears to be no basis for surmising that the withheld portions "expose an agency's decision making process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions." *Assembly*, 968 F.2d at 921 (quotation omitted).

The notion put forth by Defendants that the "graphs of the radar data have been redacted under exemption (b)(5) because these data reflect the personal opinion of the writer," *Moye Supp. Decl.* at p. 74, makes no sense. Simply creating several graphs does not equate to advocating a point of view. It is telling that other graphs that are part of this record and that contain similar radar data were not withheld. If those graphs reflect the writer's "opinion," then such opinion was incorporated into the final agency decision anyway.

Defendants have not met their *Celotex* burden of showing that this material is predecisional or deliberative, and the Court therefore DENIES summary judgment concerning Record 76.

iii. Plaintiff's Record 77

Next, Defendants move for summary judgment on Plaintiffs Record 77. This record (also designated as NTSB Record 35 and MORI Document ID# 1147382) is a ten-page document prepared by the NTSB staff that depicts in graphic form "various outcomes of the Main Wreckage Simulation for TWA flight 800 depicting differing parameters on the x and y axes." *See Moye Supp. Decl.* at ¶ 6(c). One graph was released in full; the other nine have been redacted. *Id.* Defendants argue that the data reflects "the personal opinion of the [creator of the graphs, was a member of the accident investigation team] rather than the policy of the agency." *Id.*

Plaintiff responds, once again, that this data is factual and cannot reflect the personal opinion of the person who compiled it. Plaintiff also argues that the "deliberative process privilege is not available to shield the disclosure of these representations of the simulation because the NTSB claims to have incorporated these conclusions into its report of its final disposition."[47]

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[47] Plaintiff also claims that the one unredacted page shows that the NTSB made false assumptions in its calculations and/or analysis, and he goes on to present a technical basis for that assertion. *Clarke Decl.* (June 22, 2006), at p. 29 (Record 77 comments). This argument is irrelevant and lacks merit. It has no bearing on whether such simulations might still expose the agency's decision-making process.

These graphs are undated and Defendants do not present evidence that this record is predecisional. Although this fails to satisfy Defendants' *Celotex* burden, Plaintiff does not contest summary judgment on this ground. Assuming, therefore, that Record 77 was predecisional, Defendants have nevertheless failed to demonstrate that it is deliberative. Factual materials are exempt from disclosure only to the extent that they reveal the mental processes of decisionmakers. *Nat'l Wildlife Fed'n,* 861 F.2d at 1119. These graphs of simulation data may (or may not) be the product of the outcomes of various simulations run by the NTSB to determine where wreckage would have been found under various different scenarios, but even if these graphs represent scenarios the NTSB investigated and ultimately rejected, disclosure of the results would not reveal the "mental processes of decisionmakers." The fact of their existence and the apparent absence of any reference to them in a final report does not reveal how or why the NTSB reached its conclusions. Even if one posits that these graphs might be inconsistent with the NTSB's conclusion, the mere disclosure of an inconsistency does not "blow the lid" on the process of decisionmaking. Indeed, in a sophisticated, lengthy and closely-watched investigation such as this, who would be so naive as to assume that there was, or even could be, only one possible conclusion? How could one reasonably expect that there would be no data inconsistent with whatever the conclusion was? Merely confirming contradictions when one would expect them to be present anyway does not say much about an agency's internal deliberations.

The Court DENIES summary judgment concerning this record.

e. Plaintiff's Record 1

Defendants move for summary judgment that under Exemption 3 certain names and intelligence methods were properly redacted from Plaintiffs Record 1, also designated as MORI Document ID# 1255556. Record 1 is a one-page email "reflecting discussion between two CIA employees relating principally to airspeed and one's [sic] analyst's views regarding implications for climb/descent." *Third Buroker Decl.*, at p. 55. Redactions 1 and 7 allegedly consist of names of CIA employees, which the CIA is exempted from disclosing. 50 U.S.C.A. § 403g; *see Minier*, 88 F.3d at 801 (material within the purview of section 403g maybe withheld under Exemption 3). Once it is determined that the CIA has statutory authority to withhold the document, the information is categorically exempt. *Id.*; *Spurlock v. Fed. Bureau of Investigation*, 69 F.3d 1010, 1016 (9th Cir. 1995). There is no judicial balancing test in the application of this statute to Exemption 3. *Minier*, 88 F.3d at 801 (citing *Fed. Bureau of Investigation v. Abramson*, 456 U.S 615, 631 (1982) (Congress's scheme is one of categorical exclusion)); *McDonnell v. United States*, 4 F.3d 1227, 1248 (3d Cit 1993) (Exemption 3 does not require factual balancing test).

The CIA retains broad power to make these determinations. It is the "responsibility" of the CIA, "not of the judiciary, to weigh the variety of complex and subtle factors in determining whether disclosure of information may lead to unacceptable risk of compromising the Agency's intelligence-gathering process." *Cent. Intelligence Agency v. Sims*, 471 U.S. 159, 180 (1985). Absent evidence of bad faith in applying the statute, the Agency's determination is "beyond the purview of the courts." *Knight v. Cent. Intelligence Agency*, 872 F.2d 660, 664 5th Cir. 1989).

Plaintiff argues that the two unidentified persons who exchanged views in this email were high government officials engaged in criminal misconduct. He bases this unfounded contention on two lines from the email: "I say the plane flattened its trajectory because I want it to be at about 8000 feet when it fireballs. . ." and "The trick is to come up with a combination of speeds and descent angles that gets you to the right altitude at fireball time." These statements are taken out of context and unfairly distorted. Even those who are cynical have no basis to view such statements as evidence of an unlawful conspiracy. In *Arabian Shield Development Co. v. Central Intelligence Agency*, 1999 U.S. Dist. LEXIS 2,379 (ND. Tex. Feb. 26, 1999) (unpublished), Plaintiff contended that "the agency should not be permitted to conceal evidence of crime by classifying documents that are otherwise protected under the National Security Act." *Id.* at * 14. The court rejected that contention and declined to abridge the CIA's broad power to protect documents, stating that the plain meaning of the statute "may not be squared with any limited definition that goes beyond the requirement that the information fall within the Agency's mandate to conduct foreign intelligence." *Id.* (citing Sims, 471 U.S. at 169). I reach the same conclusion here.

Plaintiff also challenges Defendants' redaction of alleged "sources and methods" of intelligence in

Redactions 2, 4, 5 and 6.[48] Although Defendants state that the CIA relied on 50 United States Code Annotated section 403g to withhold intelligence methods, the statute that deals with the withholding of intelligence sources and methods is actually section 403-1(I). Under that statute, the agency may withhold information that would "disclose 'sources and methods' of intelligence gathering." *Minier*, 88 F.3d at 801 (citations omitted) (concerning disclosure of names of employees). However, the CIA must present evidence, by affidavit or otherwise, that the release of the contested information would actually do so. *See Church of Scientology v. United States Dep't of the Army*, 611 F.2d 738,742-43 (9th Cir. 1979); *see also Miller v. Casey*, 730 F.2d 773, 777 (D.C. Cir. 1984) The First Buroker Declaration presents such evidence only in a general sense, but does not address specific sources and methods of intelligence information. Nor does the Third Buroker Declaration; it only reiterates that "the CIA has withheld an intelligence method" from this document. Having reviewed Record 1 *in camera*, the Court cannot discern just how the extremely limited and few redactions disclose an "intelligence method." However, "the 'sources and methods' statutory mandate [is] a 'near-blanket FOIA exemption,' which is 'only a short step [from] exempting all CIA records from FOIA.' *Minier*, 88 F.3d at 801 (quoting *Hunt v. Cent. Intelligence Agency*, 981 F.2d 1116, 1120-21(9th Cir. 1992)) (alteration in original). For this reason, the Court finds the CIA's information is sufficient to justify the exemption.

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[48] In his Opposition papers, Plaintiff did not originally contest Redaction 3, but later did so. Neither Exhibit F to that Opposition nor the later June 22, 2006 Clarke Declaration explain why Redaction 3 was improper, and as such, the Court GRANTS summary judgment as to that redaction.

Plaintiff argues Redaction 2 is improper for the additional reason that the information contained in the redaction - - supposedly "an infrared satellite" - - is incorporated into the agency final decision, in that it was allegedly "recited" in the November 18, 1997 CIA video animation. Plaintiff does not provide support for this assertion. Moreover, by incorporating the content of a record into an agency final decision, the agency loses only the right to invoke the deliberative process privilege via Exemption 5; the agency may still invoke any other exemption. *Sears, Roebuck & Co.*, 421 U.S. at 161 ("if an agency chooses expressly to adopt or incorporate by reference an intra-agency memorandum previously covered by Exemption 5 in what would otherwise be a final opinion, that memorandum may be withheld only on the ground that it falls within the coverage of some exemption *other than* Exemption 5") (emphasis added). As such, Plaintiff's argument fails.

The Court GRANTS summary judgment to Defendants on Plaintiff's Record 1.

f. The NSA Computer Program

Defendants move for summary judgment that, under Exemptions 2 and 3, they properly withheld in full an NSA computer simulation and animations program.[49] Item #83 of Plaintiffs FOIA request sought a copy of the computer simulation and animation program the CIA and/or the NTSB may have used. It appears that the CIA did use an NSA computer simulation program during its investigation. *See Third Buroker Decl.*, at ¶ 7 ("One record located by the CIA was referred to the [NSA] for its review and direct response to the requester. This 'record' was responsive to [Item #83].") In refusing to release the computer program, the NSA concluded that it "would reveal investigative techniques" and that it "could expose how the U.S. Government analyzes the performance characteristics of foreign weapons systems that are aerodynamic or ballistic." *Giles Decl.*, at ¶ 10-11.

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[49] Defendants have not assigned a document identifier to this program.

The NSA also concluded that the computer program related to the NSA's core functions and activities, and as such was exempted from release under Exemption 3. *Id.* at ¶¶ 12-14. [50] Gathering primary signals intelligence is one of the NSA's core functions. *Id.* at ¶ 4. Its mission "is to intercept communications of foreign governments in order to obtain foreign intelligence information necessary to the national defense, national security, or the conduct of the foreign affairs of the United States." *Id.* The NSA states that "[p]ublic disclosure of either the capacity to collect specific communications or the substance of the information itself ca easily alert targets to the vulnerability of their communications. Disclosure of even a single communication holds the potential of revealing the intelligence collection techniques," which might then be thwarted. *Id.* at ¶ 6.

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[50] Defendants' Statement of Uncontroverted Facts, paragraph three, cites to paragraph ii of the Giles Declaration for support that the "NSA uses the [computer] program to 'analyze[] the performance characteristics of foreign weapons systems that are aerodynamic or ballistic." This is not exactly what the declaration says - - it merely describes how release of the program "could expose how the U.S. Government analyzes" performance characteristics. *Giles Decl.*, at ¶ 11. In any event, Plaintiff does not dispute this statement. *See* Pl.S.G.I. ¶ 3.

Section 6(a) of the National Security Agency Act of 1959 states that nothing "shall be construed to require the disclosure of the organization or any function of the National Security Agency, of any information with respect to the activities thereof, or of the names, titles, salaries, or number of the persons employed by such agency." Accordingly, the NSA need only show that the computer program concerns a specific NSA activity and that its disclosure would reveal information integrally related to that activity. *Hayden,* 608 F.2d at 1390. No showing need be made concerning "the particular security threats posed by the release of the" program. *Linder*, 94 F.3d at 696.

Because of the implications of disclosure of sensitive information by the NSA, courts have recognized the importance of describing only in general terms the content of NSA records and, at times, have allowed the NSA (and other agencies) to file sealed affidavits to further explain the content of withheld materials.

Plaintiff's argument that this record is discoverable, notwithstanding the statutory immunity from disclosure that the NSA enjoys, is based largely on his contention that the NSA failed to disclose (1) the dates the simulation program was used and (2) the inputs into the simulation. These arguments are irrelevant and misplaced. Defendants seek summary judgment that the program itself is exempted from disclosure, not merely that the simulation's inputs are exempt.

Plaintiff also argues that the *Vaughn* index does not include the information Plaintiff requires in order to oppose the claim of exemption. Plaintiff is correct that it is not clear from the Giles Declaration how the computer program used during the investigation of Flight 800's explosion related to the NSA's core mission, insofar as there was no showing (through affidavit or otherwise) that the program involved signal intelligence. The program itself was incomprehensible, consisting in essence of source code.

Given the inadequacy of the government's *Vaughn* index and because a computer program does not easily lend itself to *in camera* review, I ordered Defendants to submit an affidavit, to be reviewed *in camera*, describing how the program concerns a function of the NSA, as well as a general explanation of the purposes for which the program is used, how it works, and how it is operated. Defendants submitted such an affidavit, executed by a 38-year employee of the NSA who is a member of that agency's Orbit and Trajectory Modeling Team and is personally familiar with the software. His declaration unequivocally asserts that the software "is a unique tool for foreign weapons system analysis..." and he provides facts sufficient to support that assertion. The declarant further describes how disclosure of this software, or any part of it, could harm the nation.

Having reviewed this submission *in camera*, the Court concludes that Exemption 3 is applicable and on that basis GRANTS summary judgment to Defendants as to the NSA computer program.[51]

III. Conclusion

For the foregoing reasons, the Court GRANTS summary judgment to Defendants on five of the disputed records at issue in the CIA's Second Motion, and DENIES summary judgment on the remaining seven. (The specific rulings are summarized on page 2 of this Opinion.)

Defendants will not be required to actually provide the required records until the Court rules on the two remaining summary judgment motions, which the Court hopes to do within thirty days. At that point, a single, comprehensive Judgment may be procedurally appropriate and the parties will be in a position to determine whether to appeal.

IT IS SO ORDERED.
DATE: August 31, 2006

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[51] Because Exemption 3 is applicable as to the software in its entirety, the Court need not address Plaintiff's contentions as to Exemption 2 or the government's supposed failure to demonstrate that "no segregable, nonexempt portions remain withheld." *Paisley v. Cent. Intelligence Agency*, 712 F.2d 686,700 (D.C. Cir. 1983), *vacated in part on oth. grounds,* 724 F.2d 201 (D.C. Cir. 1984*); Allen v. Cent. Intelligence Agency*, 636 F.2d 1287, 1293 (D.C. Cir. 1980).

/s/

A. Howard Matz
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO. CV 03-8023 AHM (RZx)

H. RAY LAHR,

Plaintiff,

v.

NATIONAL TRANSPORTATION
SAFETY BOARD, CENTRAL
INTELLIGENCE AGENCY and
NATIONAL SECURITY
AGENCY,

Defendants.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' FIRST TWO SUMMARY JUDGMENT MOTIONS

I. Background

On July 17, 1996, TWA Flight 800 exploded in mid-air off the coast of Long Island, The government conducted an investigation and issued its findings concerning the cause of the crash. Plaintiff H. Ray Lahr contends that the government's investigation was tainted by improper conduct and, perhaps, a cover-up. Partially in response, he filed this Freedom of Information Act ("FOIA") suit seeking access to records that the government created or utilized during this investigation.

This Order addresses two motions for summary judgment separately filed by the government: one by the National Transportation Safety Board ("NTSB") and one by the Central Intelligence Agency ("CIA").[1] Each agency claims that its search for records in response to Lahr's FOIA requests was adequate and that it properly redacted or withheld certain records based on exemptions authorized by FOIA.

Having reviewed the parties' arguments, evidence, and the records themselves, the Court GRANTS IN PART AND DENIES IN PART both the NTSB's Motion for Summary Judgment and the CIA's First Motion for Partial Summary Judgment. The Court finds that in most, but not all, respects the NTSB's search was adequate, and that the CIA's Search was fully adequate.. The deficiencies in the NTSB's search are set forth *infra*. (Essentially, they apply to Requests 76, 96 and 97. The NTSB must search for records of the formulas and data used for the BREAKUP program and for the BREAKUP and BALLISTIC computer programs themselves.) As to the exemptions, the following chart summarizes the outcome, as explained more fully in the text of this Order.

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[1] CIA also filed a separate, Second Motion for Partial Summary Judgment, which was resolved by this Court's Order of August 31, 2006. *See*, Lahr v Nat'l Transport. Safety Bd., F. Supp. 2d ___ 2006 WL 2789870.

NTSB RECORDS

NTSB	PLAINTIFF	SUMMARY JUDGMENT	DISCLOSURE REQUIRED?
6	56	DENY	YES
8	59	DENY	YES
15	70	DENY	YES
27	74	GRANT/ DENY IN PART	SOME (WITH SEGREGATION)

CIA RECORDS

DOC INDEX	MORI[2]	PLAINTIFF	SUMMARY JUDGMENT	DISCLOSURE REQUIRED?
903	603	50	DENY	YES
318	343	2	DENY	YES
334	344	23	GRANT	NO
342	350	7	DENY	YES
324	352	18	DENY	YES

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[2] The Document Index and MORI references are to the last three digits of the Government's numbering system. As the Court previously noted, the parties affixed multiple and confusing identifications to given documents.

014	014	41	DENY	YES
015	015	9	GRANT	NO
016	016	10	DENY	YES
017	017	13	DENY	YES
018	018	42	DENY	YES
200	200	45	DENY	YES
202	202	32	DENY	YES
320	320	52	DENY	YES
194		28	GRANT/ DENY IN PART	SOME (WITH SEGREGATION)
195		27	GRANT/ DENY IN PART	SOME (WITH SEGREGATION)
196		29	DENY	YES
024		43	GRANT	NO
209		46	DENY	YES

A. Factual Summary

1. The Crash Investigation and Ensuing FOIA Litigation

The government's investigation of the crash of Trans World Airline ("TWA") Flight 800 ("Flight800") on July 17, 1996 has already been addressed in depth in the Court's August 31, 2006 First Summary Judgment Order. The Court expressly adopts that background and the findings set forth in that Order.

2. Plaintiff's Allegations of Government Impropriety

Plaintiff's main contention, which he seeks to prove through his FOIA requests, is that the Defendants helped participate in a massive cover-up of the true cause of the crash of Flight 800, which he believes was a missile strike. Because Plaintiff alleges

> that responsible officials acted negligently or otherwise improperly in the performance of their duties, [he] must establish more than a bare suspicion in order to obtain disclosure. Rather, the requester must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred.

Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 174 (2004). In the First Summary Judgment Order, the Court considered the evidence proffered by Plaintiff in support of his contention that the government acted negligently or improperly in its investigation. Defendants did not object to or even respond to this evidence in any of the three motions, so Plaintiff's assertions have not been repudiated.

In adopting here its previous finding that the evidence is sufficient to suggest that the government acted improperly in its investigation of Flight 800 (or at least performed in a grossly negligent fashion), the Court reiterates that that conclusion is based on a characterization of the evidence in the light most favorable to Plaintiff, but does not reflect or constitute any finding by the Court.

B. Procedural Summary

On November 6, 2003, Plaintiff H. Ray Lahr filed suit against the NTSB, and later added as defendants the CIA and National Security Agency. Lahr is a former Navy pilot and retired United Airlines Captain who has served as the Air Line Pilots Association's Southern California safety representative for over fifteen years. Each defendant is a government agency subject to FOIA, 5 U.S.C.A. § 552. On December 17, 2003, Lahr filed a First Amended Complaint, and on February 6, 2006, he filed a Second Amended Complaint ("*SAC*"). The *SAC* seeks proper identification by the Defendants of records responsive to requests that Lahr has made under FOIA, preliminary and final injunctions prohibiting Defendants from further withholding the records at issue, and a mandatory injunction requiring certain of Defendants' computer and software programs to be made available to Plaintiff for inspection. *SAC*, at pp.6-7.

The three separate partial summary judgment motions that Defendants have filed cover all records from which the government has redacted material, either in full or in part. First, on June 8, 2004, the NTSB filed a Motion for Partial Summary Judgment as to all redacted and withheld records originally found in that Agency's files. On September 27, 2004, the Court heard oral argument, took the motion under submission, and ordered these records be provided in unredacted form for *in camera* review.

Second, on August 16, 2005, the CIA filed its First Motion for Partial Summary Judgment, concerning records found in CIA files. On October 18, 2005, the Court took that motion under submission without oral argument, and recently ordered that the records at issue in that motion be provided in unredacted form for *in camera* review.

Third, on May 1, 2006, the CIA filed its Second Motion for Partial Summary Judgment, concerning the remaining records found in CIA files. As already noted, on August 31, 2006, this Court issued its First Summary Judgment Order, granting in part and denying in part that motion. Many of the records included in the Defendants' first and second motions are no longer at issue, and the Court need not consider them at this time. However, the government's use of FOIA exemptions to withhold or redact four records from the first motion and eighteen from the second motion are still disputed. So are Defendants' requests for a ruling that their respective searches for these records were adequate.

II. Discussion

A. Legal Standards

The relevant legal standards concerning both motions for summary judgment and FOJA are found in the First Summary Judgment Order. 2006 WL 2789870 at *6 - 16. The Court expressly adopts the legal standards set forth in that Order and incorporates them herein, by reference. In addition, the Court notes the following.

FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt." 50 U.S.C.A. § 552(b). The burden lies with an agency to demonstrate that "no segregable, nonexempt portions [of a record] remain withheld." *Paisley v. Cent. Intelligence Agency*, 712 F.2d 686, 700 (D.C. Cir. 1983), *vacated in part on other grounds*, 724 F.2d 201 (D.C. Cir. 1984); *Allen v. Cent. Intelligence Agency*, 636 F.2d 1287, 1293 (D.C. Cir. 1980). Agencies may meet this burden by describing through affidavit, in a non-conclusory manner, why such information is not reasonably segregable. *Wilkinson v. Fed. Bureau of Investigation*, 633 F. Supp. 336, 350 (C.D. Cal. 1986). Furthermore, an agency cannot justify withholding an entire document simply by showing it contains some exempt material; instead the non-exempt portions must be disclosed unless they are "inextricably intertwined" with the exempt portions. *Mead Data Central, Inc. v. United States Dep't of the Air Force*, 556 F.2d 242, 260 (D.C. Cir. 1977). Conversely, if an entire document is properly exempt, then no segregation is necessary.

B. Analysis

1. The Adequacy of the NTSB and CIA Searches

Defendants moved for summary judgment that the NTSB and CIA's searches were adequate.[3] Plaintiff challenges Defendants' contentions. Defendants have the burden of establishing that their searches were adequate. (*See* pages 16-17 of the First Summary Judgment Order.)

a. The NTSB Search

Plaintiff submitted 145 specific FOIA requests to the NTSB. *Moye Decl.*, at 21. In order to establish that it conducted a reasonable search, the NTSB submitted the declarations of Melba D. Moye, the Chief of the Public Inquiries/FOIA Branch in the Office of Research and Engineering at the NTSB; Dennis Crider, a National Resource Specialist for Vehicle Simulation in the Vehicle Performance Division of the Office of Research and Engineering of the NTSB; and Doug Brazy, a Mechanical Engineer in the Vehicle Recorder Division.

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[3] The NTSB's Motion for Summary Judgment did not explicitly state it was so moving, but Defendants argued the merits of such a motion, both factually and legally. Plaintiff's Opposition and Defendants' Reply treated this as a proper motion, and therefore Plaintiff had an adequate opportunity to oppose it. Therefore, the Court will treat Defendants' arguments as a properly-noticed motion.

The NTSB searched three sets of agency records: the NTSB Public Docket, the Accident Briefs/Summaries and NTSB Accident Investigation Files. NTSB S.G.I ¶ 16; *Moye Decl.*, at ¶¶ 20(a)-(c). Moye described how the NTSB searched the electronic indexes and databases constituting the NTSB Public Docket and the Accident Briefs/Summaries. *Id.* at ¶ 20(a)-(b). To search the Accident Investigation Files, the NTSB FOIA office contacted staff who might have potentially responsive records and asked them to search for records responsive to Plaintiff's FOIA requests. *Id.* at ¶¶ 20(c), 22. The NTSB searched for potentially responsive information only where it believed it was reasonably expected to be located, based upon its construction of the term "zoom-climb" that Plaintiff used in his requests. *Id.* at ¶ 24. (Both parties agree that the term "zoom-climb" referred to the "flight path of the aircraft following the loss of the forward fuselage." NTSB S.G.I ¶ 14.) Similarly, the NTSB construed the term "animation" to mean the "four graphical accident reconstructions shown at the public hearing on December 8, 1997." NTSB S.G.I ¶ 23; *Moye Decl.*, at ¶ 25. These searches ultimately found several responsive records. *Id.* at ¶30.

Crider was the only NTSB staff member "responsible for deriving the calculations and/or computations of the flight path for TWA flight 800 [and] was the only NTSB staff [member] who created a computer simulation of the flight path of the accident airplane." NTSB S.G.I. ¶ 21; *Moye Decl.*, at ¶ 27; *Crider Decl.*, at ¶ 46. Crider claims that by the time he received Plaintiff's FOIA requests, he had already searched his files and provided all of his Flight 800-related records to the NTSB 'S FOIA office, in response to previous requests Lahr had made. *Id.* at ¶ 47. These prior records included his "handwritten notes, draft reports with handwritten comments, preliminary graphs of results from the simulation program, a copy of the executable computer simulation program from the TWA flight 800 investigation," data provided by Boeing, and some records from the Trajectory Study. *Id.* ¶¶ 36-37, 40. In response to Plaintiffs October 8, 2003 FOIA request, Crider reviewed the Flight 800 records be had previously handed over to the FOIA office and also searched for more records. *Id.* at ¶ 47. However, be located no new responsive records. *Id.* Later, Crider located both "the last control system source file and the aerodynamics source file specific to TWA Flight 800." *Supp. Crider Decl.*, at ¶ 6. Crider's declaration explains, in detail, how he conducted records searches to respond to groups of related FOJA requests by Plaintiff. *Crider Decl.*, at ¶¶ 48(a)-(l).

As a preliminary matter, simply because Crider located two responsive records after his initial search and the NTSB's initial response to Lahr does not necessarily undermine the adequacy of his search. A search is not unreasonable simply because it fails to produce all relevant and responsive materials. *Meeropol v. Meese,* 790 F.2d 942, 952-53 (D.C. Cir. 1986). To reach the opposite conclusion "would work mischief. . . by creating a disincentive for an agency to reappraise its position, and when appropriate, release documents previously, withheld." *Id.* at 953 (quotation omitted).

Brazy was the only NTSB staff member "responsible for creating the animations of the flight path of TWA flight 800 shown at the public hearing on December 8, 1997." NTSB S.G.I. ¶ 22; *Moye Decl.*, at 28; *Brazy Decl.*, at ¶¶ 5, 7. Brazy searched both his office and the space around the computer systems used to create the four animations for records responsive to Plaintiff's requests. *Id.* at ¶ 30. He provided the records he located to the FOIA office on two compact discs (CDs), both containing electronic files; Brazy located no paper records responsive to Lahr's requests. *Id.* at ¶ 38. Brazy also located two CIA files, which were referred to that agency for response. *Id.* at ¶ 39; *Moye Decl.*, at ¶ 31.

Plaintiff submits a great deal of evidence that he believes is supportive of a finding of agency bad faith regarding the crash investigation itself, but this evidence is irrelevant to an analysis concerning the adequacy of the NTSB's search. Because Lahr provides no evidence suggestive of bad faith of the NTSB in conducting its search, the Court finds that it conducted the search in good faith. *See Meeropol*, 790 F.2d at 952.

An agency's search for documents must only be reasonable and does not have to uncover every record that may potentially exist. *Zemansky*, 767 F.2d at 571. In *Oglesby v. United States Department of the Army*, 920 F.2d 57, 67-68 (D.C. Cir, 1990), *appeal after remand*, 79 F.3d 1172 (D.C. Cir. 1996), the Court of Appeals for the District of Columbia considered the adequacy of the State Department's search for records. The FOIA requestor challenged the reasonableness of the search "because the agency only searched the record system 'most likely' to contain the requested information." *Id.* at 67. The court noted that "[t]here is. . . no requirement that an agency search every record system." *Id.* at 68. However, the court found that,

> [a] reasonably detailed affidavit, setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials . . . were searched, is necessary to afford a FOIA requestor an opportunity to challenge the adequacy of the search and to allow the district court to determine if the search was adequate in order to grant summary judgment.

Id. The court concluded that the agency had failed to satisfy its burden. *Id.* (noting that the agency affidavit failed to "identify the terms searched or how the search was conducted.").

Here, the NTSB recounted the general areas where responsive records were reasonably likely to be located. *Moye Decl.*, at ¶ 20. Lab was referred to public records, which the NTSB also searched to no avail. *Id.* at ¶J 20(a)-(b). Regarding the NTSB's Accident Investigation Files, the NTSB searched the locations where it believed potentially responsive documents were located. *Id.* at ¶ 20(c). This included the paper and computer files of NTSB employees from the Vehicle Performance and Vehicle Recorder Divisions of the Office of Research and Engineering whom the NTSB labeled as "principally responsible for the final Main Wreckage Flight Path Study. . . and the creation of the animations." *Id.* at ¶ 2. The NTSB identified the employees who worked on the Main Wreckage Flighi Path Study as its focus because it was that study that led to the simulation of the flight path of the main wreckage after the separation of the forward fuselage. *Id.* The Vehicle Performance Division also searched for records related to the Trajectory Study because some of that work ultimately contributed to the Main Wreckage Flight Path Study. *Id.*

At first glance, it might seem that a search limited to those employees "principally responsible" for the Main Wreckage Flight Path Study and animations, *id*,, rather than *all* employees who worked on them, would not be "reasonably calculated" to locate all relevant documents. However, it is undisputed that Crider was the only staff member responsible for deriving the calculations and computations of the flight path of Flight 800, and Brazy was the only staff member responsible for the animations. NTSB S.G.I. ¶¶ 21-22. It stands to reason that they would have all records concerning Plaintiff's requests. Therefore, the Court finds that the NTSB's general search was adequate.

Turning to several specific requests that Lahr complains about, the Court notes preliminarily that simply because the NTSB located no responsive records for many of such requests does not make its search inadequate. Nor does Plaintiff cite authority for his contention that the NTSB was required to correlate each record in its *Vaughn* index to a specific FOIA request. Finally, that Plaintiff was provided with some material beyond the scope of his requests does not render the NTSB's search inadequate. With these principles in mind, the Court now will address specific claimed deficiencies in the NTSB's search.

(i) **Records of Formulas NTSB Used for Its "Zoom-Climb" Conclusion.**

"Category 1" of each of Plaintiffs FOJA requests 4-68 asks for "[a]ll records of formulas used by the NTSB in its computations of the 'zoom-climb' conclusions." (This refers, in part, to 64 graphs in the Main Wreckage Flight Path Study, and to two Addendums.) The NTSB responded that some of these formulas are found in the public docket, but beyond that, "the investigators may have referred to one or more textbooks when working with the computer program for the TWA Flight 800 Main Wreckage Flight Path Study, but no record was created." *Moye Decl.*, at ¶ 33(a); *Crider Decl.*, at ¶ 48(a). Furthermore, some of these formulas are found in the simulation program - - presumably Plaintiff's Record 70, *see infra* - - but according to Crider they are not comprehensible as part of the simulation code, nor can they be segregated without creating a new record. *Id.* Ultimately, beyond the records in the public docket and the simulation program, the NTSB located no further responsive records to these requests. *Moye Decl.*, at ¶ 33(a).

In arguing that the NTSB's search for these records was not adequate, Plaintiff cites to the June 16, 2004 Affidavit of Brett M. Hoffstadt, a computational fluids engineer, who states: "In my opinion, it is highly unlikely that Mr. Crider has no record of any data, and no record of any formula, that he used to write any of these 64 graphs." *Hoffstadt Aff.* (June 16, 2004), at ¶ 7. This is "insufficient to raise a material question of fact with respect to the adequacy of the agency's search." *Oglesby*, 920 F.2d at 68 n.13; *see SafeCard Servs. v. Sec. & Exch. Comm'n*, 926 F.2d 1197, 1201 (D.C. Cir. 1991) (speculation that documents might exist not enough to undermine finding of adequate search). Plaintiff's contention regarding "Category 1" of each of Plaintiff's FOIA requests 4-68 lacks merit.

The same is true as to Plaintiffs bald assertion, based solely on his expert's opinion, that the NTSB must have records of correlation of flight trajectory radar, radio transmissions and flight recorder data. *See* NTSB Opp'n, at p. 25. Such a contention, without supporting evidence, is not sufficient to dispute the government's declarations that no such records were found.

(ii) Records Upon Which the CIA Animation Was Based.

Plaintiff submitted four FOIA requests for such records. However Moye claims the NTSB had "no role in the creation of the animation presented by the [CIA] in November 1997" and does "not know what, if any, information was used by the CIA in creating its video." *Moye Decl.*, at ¶ 38; *see also Crider Decl.*, at ¶ 53; *Brazy Decl.*, at ¶ 41.

Plaintiff disagrees, citing to additional records. For example, he purports to quote a transcript of the CIA's presentation of the animation on CNN. Plaintiff claims that the transcript states: "The preceding CIA analysis included . . . data provided by the NTSB." *See* NTSB S.G.I. ¶ 27. However, the transcript actually reads: "This [the CIA's conclusion as to the flight path of the aircraft] is consistent with information provided by NTSB investigators and Boeing engineers who determined that the front third of the aircraft, including the cockpit, separated from the fuselage within four seconds after the aircraft exploded." *Donaldson Aff.* at ¶ 57 & Exh. 19 (CIA Animation Transcript), p. 1 (Bates 111). The transcript goes on to explain the process by which the

CIA came to its conclusions; at no point does it mention utilization of any NTSB data. *Id.*, Exh. 19, pp. 1-2 (Bates 111-12).

Plaintiff also cites to a portion of the Crider Declaration, in which Crider states: "I learned that Boeing was providing [aircraft data] to the Central Intelligence Agency (CIA), as well as developing its own basic estimate of the flight path, so Boeing then included the NTSB on the routing of this data." *Crider Decl.* at ¶ 13. This excerpt does not support Plaintiff's contention that the NTSB was involved in the creation of the CIA animation.

Next, Plaintiff also quotes from a response from the CIA to an earlier FOIA 'request that he had made. The CIA letter states that, in response to requests for records pertaining to the computer program and data used to produce the computer simulation of Flight 800, "the pertinent data, and resulting conclusions, were provided by the National Transportation Safety Board (NTSB). CIA simply incorporated the NTSB conclusions into our videotape." *Lahr Aff.*, Exh. 1., (Bates 391). Although Defendants have repeatedly explained the difference between a "simulation" and "animation" (or graphical reconstructions), the second sentence of the CIA's response - - that the NTSB conclusions were incorporated into the CIA's videotape - - would be sufficient to raise a material issue of fact as to whether the CIA animation also incorporated data provided by the NTSB. Nevertheless, the record is clear that the NTSB conducted a proper search for all the records it used in its calculations concerning the "zoom-climb" conclusion.

(iii) Records "Related To" The NTSB Animations.

Plaintiff challenges the NTSB 'S response to his request for essentially all records "related to" the four NTSB animations of the crash that were shown at a December 8, 1997 public hearing. Defendants claim that all responsive records found in the possession of Brazy were released to Plaintiff (with the exception of two records referred to the CIA).[4] *Moye Decl.*, at ¶ 34. As noted earlier, Brazy was the only NTSB staff member responsible for creating these animations. NTSB S.G.I. ¶ 22; *Moye Decl.*, at ¶ 28; *Brazy Decl.*, at ¶¶ 5, 7. Presumably, he would have the data or other information that he used in creating the animations. *See Id.* at ¶¶ 8-12, 16, 18-19, 33. Brazy stated that the "animations are a visual depiction of the data presented from the radar sources, the digital flight data recorder, and/or the data from the simulations presented in the Main Wreckage Flight Path and Trajectory Studies" *Id.* at ¶ 8. He also noted that the animations used "verified data and FDR data," as well as the results of the Main Wreckage Flight Path Study, which was based in part on Crider's simulation data. *Id.* atf 17-18. Crider agreed with Brazy's descriptions. *Crider Decl.*, at ¶11 50-51. Brazy searched his office "and the space around the computer systems" used to create the four animations. *Id.* at ¶ 30. If Plaintiff had simply requested materials used directly to create the animations, Brazy search would have been sufficient. However, many of Plaintiff's requests concerning the animation ask for all records used by the NTSB to come to the zoom-climb conclusion upon which the animations were based. Essentially, this is the same request discussed earlier, however, and if the NTSB had limited its search only to the efforts of Brazy, it might have been inadequate, because the NTSB also was required to search for underlying records used in the analysis leading to the "zoom-climb" conclusion.

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[4] Plaintiff mistakenly states that the NTSB claimed it had "no responsive records." NTSB Opp'n, at p. 24. *See, infra.*

Although Lahr's FOIA requests encompassed the records underlying the data Brazy used to create the animations, and not just the data he directly used in doing so, the NTSB's search still was not inadequate, because it did look for all records of formulas used in its calculations concerning the "zoom-climb" conclusion.

Finally, Plaintiff argues that the records Brazy actually located are inadequate because they are not useful for his purposes, at least not without additional information. *See McGauley Aff.* at ¶¶ 3-4 (Bates 470). Whether the responsive records are useful or not is irrelevant to the adequacy of the NTSB search.

(iv) The BALLISTIC and BREAKUP Programs.

The Court finds that the NTSB's search for records responsive to FOIA requests 76, 96, and 97 was inadequate.

Plaintiff challenges the NTSB's failure to produce two computer programs - - the BALLISTIC program and the BREAKUP program - - in response to several FOIA requests. Defendants contend that the "predicate for Lahr's 145 [FOIA] requests was the 'zoom-climb conclusion," and if the programs were not used to come to this conclusion, they were not responsive. *See* NTSB Reply, at p. 23. Defendants argue that these two programs were not used to determine the aircraft's flight path after the separation of the nose section and forward fuselage. *See Moye Decl.*, at ¶ 36. Moye explains that the BREAKUP program provided the *timing* of when the nose separated from the aircraft, which was used in the simulation, and both programs were used to determine the trajectory of certain pieces of the aircraft (not including the main body, apparently). *Id.*

The Court agrees with Plaintiff that, concerning FOIA request 16, the BREAKUP program was used to help reach the "zoom-climb conclusion," so far as the nose separation timing was a factor in this conclusion. *See Id.* Therefore, the Court ORDERS NTSB to review its records to locate "[a]ll records of the formulas and data entered into the computer simulations" that involved the calculation of the nose separation timing and provide any responsive records to Plaintiff, subject to any applicable exemptions.

Defendants have adequately established that no records were responsive to FOIA request 77 because the BALLISTIC program was not used in any manner in connection with the "zoom-climb conclusion."

FOIA requests 96 and 97, although in artfully drafted, are for the BREAKUP and BALLISTIC programs themselves. Despite Defendants' contentions, there is no modifying language that limits the requests for these programs. *See Miller v. Casey*, 730 F.2d 773,777 (D.C. Cir. 1984) (FOIA request is read as drafted, not as someone wishes it might be drafted). Therefore, the Court ORDERS the NTSB to review its records to locate the BREAKUP and BALLISTIC programs and provide those programs, if located, to Plaintiff, subject to any applicable exemptions.

(v) Records of the Process by Which the NTSB Reached its "Zoom Climb" Conclusions.

Plaintiff disputes the adequacy of the NTSB's search in response to his request for "[a]ll records of the process by which the NTSB arrived at its zoom-climb conclusions." (FOIA request 136 and FOIA requests 138 through 141, which are subsets of request 136.) The NTSB did not search for records responsive to this request, stating that the request "is too inexact for the agency to determine how to search for responsive records." *Moye Decl.*, at ¶ 33(j). The NTSB suggested to Lahr that he amend this request to more clearly identify which records he sought, but he did not do so. *Id.* Plaintiff responds that the term "process" is "broad but not too inexact for defendant to search for records of the method by which it arrived at its zoom-climb conclusion." *See Joint Statement*, at p. 923.

Under FOIA, an agency is required to make records promptly available upon a request that "reasonably describes" the records sought. 5 U.S.C.A. § 552(a)(3)(A). "A description 'would be sufficient if it enabled a professional employee of the agency who was familiar with the subject area of the request to locate the record with a reasonable amount of effort." *Marks v. United States Dep't of Justice*, 578 F.2d 261, 263 (9th Cir. 1978) (citation omitted). This requirement should not be treated as a loophole by agencies, but "broad, sweeping requests lacking specificity are not permissible." *Id.*

If an agency knows "'precisely' which of its records have been requested and the nature of the information sought" from those records, then the records requested have been adequately described. *See, e.g., Yeager v. Drug Enforcement Agency*, 678 F.2d 315, 326 (D.C. Cir. 1982). Here, unlike in *Yeager,* there is evidence that the agency was truly and understandably unclear as to the nature of Plaintiff's request. *See Moye Decl.*, Exhs. 11-14, 11-15 (November 6, 2002 and November 6, 2003 letters to Plaintiff that requested clarification of the meaning of "process"). If Lahr intended this to be a catch-all provision -- as is suggested by his description that this "request seeks any records not otherwise specifically identified" -- then even if he had drafted it as such the NTSB could not have conducted a reasonable search, under the circumstances.

b. The CIA Search

Plaintiff originally submitted 105 FOIA requests to the CIA, but the Court struck all but 17, pursuant to a Stipulation and Order dated July 13, 2005. The CIA has moved for a ruling that it conducted a reasonable search of its records to find all responsive records to those remaining requests. In support of this, the CIA submitted the declaration of Terry Buroker, the Information Review Officer for the Directorate of Intelligence ("DI") of the CIA. *First Buroker Decl.*, at ¶ 1. Buroker explained that the Public Information Programs Division ("PIPD") in the Office of Information Management Services is the initial reception point in the CIA for all FOIA requests. *Id.* at ¶ 19. The CIA does not maintain a centralized records system. *Id.* at ¶¶ 15-16. Therefore, each FOIA request is analyzed to determine which of four directorates of the CIA might reasonably be expected to possess responsive records. *Id.* at ¶ 19. PIPD will forward copies of the request with instructions to conduct such a search for these records. *Id.* That is the procedure that was followed in this case. *Id.* at ¶ 20.

In this case, PIPD determined that the Directorate of Intelligence ("DI") was the only directorate "reasonably likely to have records responsive to the Plaintiff's request[s]." *Id.* at ¶ 21. The DI is the CIA component that "analyzes, interprets, and forecasts foreign intelligence issues and world events of importance to the United States." *Id.* at ¶ 22. DI personnel who are trained to conduct FOIA and other record searches conducted a search of the automated DI records system. *Id.* at ¶ 23. "No responsive information was located in the automated records systems at the directorate level." *Id.* When this search proved unproductive, Buroker's office requested the Office of Transnational Issues ("OTI") in the DI to conduct a separate search for records. *Id.* at ¶ 24. A senior OTI weapons analyst who was one of the principal analysts on the Flight 800 team participated in the search, which extended to "office and individual analyst files, including local databases, e-mail, and desk files." *Id.* This search led to records that were forwarded to Buroker's office. *Id.*

The records were searched a second time, which led to additional responsive material. *Id.* at ¶ 25. Buroker claims that most of the specific requests were "unintelligible, did not describe records in terms that were meaningful to the CIA, or sought records that could only be found at the NTSB," *id.* at ¶ 25 n.7. Therefore, Buroker's staff focused on Plaintiff's overarching request for "records upon which [the] publicly released aircraft flight path climb conclusion was based." *Id.* at ¶ 24.

Ultimately, this resulted in the identification of about one hundred records. *Id.* at ¶ 25.

The CIA submitted its first *Vaughn* index, attached to the First Buroker Declaration, on June 20, 2005. On August 16, 2005, the CIA supplemented this *Vaughn* index by submitting the Second Buroker Declaration, to which was attached copies of all records that were withheld only in part by the government. The Second Buroker Declaration also added two records not previously identified in the CIA's first *Vaughn* index.

Plaintiff's first challenge to the adequacy of the CIA's search argues that the CIA's *Vaughn* index was filed without a copy of the records, and that the 107 pages accounted for in the index did not match the 246 pages the CIA supposedly produced in February, 2005. Plaintiff also argues that, adding the 128 pages for the two new records identified in the Second Buroker Declaration, the total should have been 255 pages, but the filing contained 388 pages. Plaintiff is wrong. The CIA's response appears to be in good faith. The motion and the *Vaughn* index included 327 pages of records withheld in full or in part and attached to one or the other of the CIA's February and June 17, 2005 transmittal letters. Plaintiff submits no evidence in dispute of this.[5] The Second Buroker Declaration adds two additional records, together totaling 128 more pages, to the thirty records and 327 pages identified in the *Vaughn* index. Together, 32 records consisting of 455 pages are at issue. Given that the CIA withheld in full six records consisting of 66 pages, 389 pages should appear, in the Second Buroker Declaration. This is exactly how many actually appear. Plaintiff's contention is without merit or mathematical support.

Next, Plaintiff argues that the MORI numbering system utilized by the CIA did not allow Plaintiff "to decipher what records were produced and withheld nor to correlate the exemptions asserted with the records withheld." With this, the Court cannot agree, although the *Vaughn* index was inadequate to the extent that it did not include redacted copies of those records withheld only in part and that it contained a different document indexing system than that used in the CIA's earlier transmittal letters. Notwithstanding that the CIA's MORI document numbering system is confusing and frustrating, in ¶ 8 of his Second Declaration Buroker clearly identified, via cross references, each record based on the CIA's MORI Document ID number (as found in the transmittal letters), its *Vaughn* Document Index number (essentially a "second" MORI number), and its *Vaughn* Document Index page number (which contained the government's bases for withholding all or part of each record). From this chart, Plaintiff was able to compare these record numbers, and refer to the government's description of each record. For Plaintiff to note two typographical errors, *see Schulze Aff*, at ¶ 25, is typically nit-picky; Plaintiff was clearly able to identify and rectify these errors with little trouble and they are not evidence of bad faith. Finally, although Plaintiff claims there is no entry for the "Analyst Note" identified on page 59 of the *Vaughn* index, the fact that this record had been withheld in full was clearly revealed in paragraph 16 of the Second Buroker Declaration, and because it was withheld in full, there was no redacted record for Plaintiff to review.

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[5] For instance, Plaintiff does not submit as evidence copies of the attachments at Tabs B and C of the February and June letters, and his page totals found in footnotes 1, 2 and 4 of the Sur-Reply lack supporting evidence and contain mathematical errors such that the Court cannot rely on them.

Next, Plaintiff argues that multiple records contained the same MORI numbers, and, conversely, other records were spread out in pages containing differing MORI numbers. *See also Schulze Aff*, at ¶ 22. Defendant explains that much of the responsive material to Lahr's FOIA request was located in analyst working files. *Koch Decl.*, at ¶ 15. As such, this material may not contain official document numbers, page numbers or dates, and may be handwritten or contain handwritten annotations. Alternatively, it may be in electronic form or consist of copies of electronic communications. *Id.* Furthermore, such documents are not necessarily "complete" and may contain extracts of documents, books or other "snippets of information." *Id.* One record often consists of multiple documents containing attachments, such as cover memoranda or notes to files with attachments. *Id.* at ¶ 16. Such information is copied and produced "as is," and the CIA does not alter the content by reorganizing documents. *Id.* at ¶ 17. The government's explanation is adequate, and Plaintiff's allegations are not evidence of governmental bad faith.

Next, Plaintiff argues that at least four records previously produced in redacted form were missing from the Second Buroker Declaration, and the "document records have been redacted by removing an unknown number of important pages." *See Schulze Aff.* at ¶J 30-32, 39, 61. Unfortunately, the Schulze Affidavit itself is largely incomprehensible, and the affiant often fails to provide support for conclusory statements that pages have been removed. (*E.g.*, ¶¶ 31, 32 and 49). As already noted, the CIA has no obligation to reassemble or reconstruct the original document.

Next, Schulze argues that MORI Document ID numbers 1147417 and 1147418 were listed in the CIA index but not produced with the Second Buroker Declaration. *Schulze Decl.*, at ¶ 6 1-62. The Court could not find such references in the CIA's indexes listed in the February and June letters, the *Vaughn* index, and the Second Buroker Declaration. Once again, these allegations do not establish bad faith on the part of the government.

Next, Plaintiff complains that one record -- an "Analyst Note" -- appearing in the *Vaughn* index did not appear in the Second Buroker Declaration, and that although Buroker states six records were withheld in full, only five appear in the *Vaughn* index. There was an error at page 59 of the *Vaughn* index, and it was corrected. *Second Buroker Decl.*, at ¶ 16. Again, there is no evidence of bad faith on the part of the government concerning this record.

Next, Plaintiff argues that the CIA failed to identify nine responsive records which it maintains in electronic format. *See Id.* at ¶¶ 31, 33, 44, 47, 62, 66-69. Plaintiff offers no persuasive basis for finding that some of these records even exist. Nor is there evidence to suggest that the CIA searched in bad faith or did not conduct an adequate search for these records.

Finally, Plaintiff argues, in his Sur-Reply, that the *Vaughn* index was inadequate because it was essentially spread out among two documents: the *Vaughn* index filed on June 20, 2005, and the Second Buroker Declaration filed on August 16, 2005. A *Vaughn* index should be "contained in one document, complete in itself." *Founding Church of Scientology v. Bell,* 603 F.2d 945, 949 (D.C. Cir. 1979). Additionally, an index with as many records and pages as this one should contain a table of contents as well as tabs for each document, as did the CIA's recent *in camera* submission. Although the CIA did not present the index this way, the Court cannot find that its actions were in bad faith.

The CIA's search for records was adequate.

2. Claims of Exemption

a. Exemptions 6 and 7(C) (Privacy Redactions): Plaintiff's Records 2, 7, 10, 18, 28, 41, 42, 43, 50 and 52

In ten records, the CIA redacted the names of eyewitnesses, eyewitness identification numbers, or both, claiming the redactions were proper under Exemptions 6 and 7(C). Plaintiff challenges many of these reactions. Preliminarily, the Court finds (because a balancing analysis is in order) that the government's investigation and findings concerning the crash of TWA Flight 800 involve a matter of great public interest. *See*, First Summary Judgment Order, __ F.Supp. 2d ___, 2006 WL 2789870 at *20.

Defendants describe Plaintiff's Record 2,[6] dated February 12, 1997, as an "[i]ntemal memo that makes recommendations as to questions that should be asked specific eyewitnesses to the explosion during interviews." *First Buroker Decl.*, at p. 43. It is one page in length and the sender and recipients are redacted in the released copy. The deletion of their names is not contested, but eighteen redactions of eyewitness names under Exemptions 6 and 7(C) are challenged. Plaintiff' s Record 7[7] is a "Technical Analysis Briefing of TWA Flight 800 prepared for James K. Kallstrom, Assistant Director, FBI, containing background information, data sources, analysis, diagrams and summaries of eye witness accounts." *Id.* at p. 49. It appears to be a 38-page PowerPoint presentation from March 1997. The names of two FBI Special Agents for whom this record was apparently also prepared, are redacted.

Defendants describe Plaintiffs Record 10,[8] dated April 16, 1997, as an "[i]nternal email containing information relating to one particular eyewitness account of TWA 800 explosion and analysis attempting to place relative to second eyewitness." *Id.* at p. 64. It is one page in length and eyewitness names are redacted.[9]

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[6] Plaintiff's Record 2 is also identified by Document Index # 1147318 and MORI Document ID # 1176343.

[7] Plaintiff's Record 7 is also identified by Document Index # 1147342 and MORI Document ID # 1176350.

[8] Plaintiff's Record 10 is also identified by MORI Document ID # 1215016.

Defendants describe Plaintiff's Record 18,[10] dated October 17, 1997, as an "[i]nternal email discussing new radar plots, certain eyewitness accounts, how they correlate, and impact on analysis." *Id.* at p. 51. It is two pages in length. Plaintiff contests ten redactions of eyewitness names or identification numbers under Exemptions 6 and 7(C); eight other redactions, either of CIA employees under Exemption 3 or FBI special agents under Exemptions 6 and 7(C), are not contested.

Defendants describe Plaintiff's Record 28,[11] dated March 17, 1998, as a "[d]raft report containing preliminary analysis and conclusions regarding radar tracking of TWA Flight 800." *Id.* at p. 56. This seventeen-page record entitled "Analysis of Radar Tracking of the TWA 800 Disaster on July 17, 1996," was withheld in full and contains a redaction of the name of an FBI special agent.

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[9] Although somewhat confusing due to a numbering mistake, the Joint Chart makes clear that Plaintiff only means to challenge this record's privacy redactions under Exemptions 6 and 7(C).

[10] Plaintiff's Record 18 is also identified by Document Index # 1147324 and MORI Document ID # 1176352.

[11] Plaintiffs Record 28 is also identified by MORI Document ID # 1215194. This record also contains other contested redactions which are addressed later in this Order.

Plaintiffs Record 41[12] consists of "[b]ar charts of data illustrating the timeline of eyewitness visual and audio accounts of TWA 800 explosion and handwritten analyst notes containing underlying data," *Id.* at p. 67. It is undated and is nine pages long, consisting of seven pages of computer-generated bar graphs, with each witness's name redacted adjacent to graphs of the timing of their observations of the crash, and two pages of handwritten notes, of which the only redacted portion is handwritten eyewitness names. Plaintiff contests all of these redactions.

Defendants describe Plaintiff's Record 42,[13] dated November 14, 1997, as an eight-page "[i]nternal email with attachments described as final reports to FBI: key points of analysis, TWA 800 questions and answers, reports as to what eyewitnesses saw, and two subsets of brief summaries of certain eyewitness accounts." *Id.* at p. 70. Plaintiff contests twenty-three redactions of eyewitness names under Exemptions 6 and 7(C); other redactions under Exemption 3 are not contested.

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[12] Plaintiff's Record 41 is also identified by MORI Document ID # 1215014.

[13] Plaintiff's Record 42 is also identified by MORI Document ID # 1215018.

Defendants describe Plaintiff's Record 43[14] as a "draft with handwritten annotations reflecting candid discussion and opinions of individuals both within and between FBI and CIA regarding CIA analysis of eyewitness reports." *Id.* at p. 65. It is five pages long, undated and withheld in full. Plaintiff does not contest Defendants' redactions of names of CIA employees under Exemption 3, al4ugh he does contest the redactions of the names of FBI special agents and eyewitnesses under Exemptions 6 and 7(C), as well as the withholding of the entire record under Exemption 5.

Plaintiffs Record 50[15] is a 48-page spreadsheet "containing names of eyewitnesses (over 230) interviewed following TWA 800 explosion and other associated data -- e.g., location utilized in sound propagation analysis." *Id.* at p. 55. The record is undated. The CIA redacted every eyewitness name from this document, and Plaintiff challenges each redaction.

Defendants describe Plaintiff's Record 52[16] as a report that contains eyewitness accounts of the destruction of TWA Flight 800, including location, observations, and analysis regarding distance and direction of respective eyewitness at the time of the explosion and elapsed time for initial sound to reach the witness." *Second Buroker Decl.*, at p. 17. It is undated, and the record contains redactions of names and initials of

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[14] Plaintiff's Record 43 is also identified by MORI Document ID # 1215024. This record also contains other contested redactions which are addressed later in this Order.

[15] Plaintiff's Record 50 is also identified by Document Index # 1080903 and MORI Document ID # 1175603.

[16] Plaintiff's Record 52 is also identified by MORI Document ID # 1232320.

eyewitnesses on each page, all of which Plaintiff challenges.[17]

As with the Second CIA Motion, Defendants argue that the eyewitnesses to the crash have a privacy "interest in not being subjected to unofficial questioning about the analytic project or investigation at issue and in avoiding annoyance or harassment in their. . . private lives." *First Buroker Decl.* at ¶ 46. Defendants' support for their asserted privacy interest is identical to that set forth in the Second CIA motion.

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[17] Plaintiff did not initially contest most of Defendants' redactions under Exemptions 6 and 7(C). In their Reply to the CIA's Second Motion for Partial Summary Judgment, Defendants stated:

> When plaintiff responded to the First CIA Motion, he did not oppose the use of Exemption 6 or, in the alternative, Exemption 7(C) to withholds from the records covered by the First CIA Motion, the names of FBI agents or of eyewitnesses to the explosion of TWA Flight 800. . . Changing his position, he now alleges that he does contest the use of the above exemptions to withhold, from those records, the names of FBI agents and eyewitnesses.

Def Reply, at p 16 n.2. However, in the Joint Chart filed on July 21, 2006, Plaintiff opposed the redactions in all of these nine records on Exemption 6 and 7(C) grounds, and Defendants did not object to Plaintiff's right to do so (as they did to some of Plaintiff's other contentions. Defendants claim Plaintiffs earlier statement should be treated as a binding waiver. *Id.* However, the Court finds that Plaintiff's express arguments in the Second CIA Motion, coupled with the parties' joint submission of Plaintiff's contested redactions as found in the Joint Chart, provided clear notice that Plaintiff intended to ultimately challenge these redactions. Moreover, Defendants were permitted an opportunity to respond to Plaintiff's arguments. Therefore, the Court will consider Plaintiff's opposition to these redactions.

For the reasons set forth in the August 31, 2006 Summary Judgment Order, the Court finds that Defendants have not established protectable privacy interest that would be implicated by the release of witness identification numbers, and that the public interest in uncovering alleged agency malfeasance and wrongdoing in the investigation of the crash of Flight 800 outweighs the privacy interest that conceivably exists in eyewitness names. F.Supp. 2d —, 2006 WL 2789870 at *14, 16 and *20-21. The Court further finds that under Exemption 7(C) the release of these names could not reasonably be expected to constitute an unwarranted invasion of personal privacy, and, under Exemption 6, their release would not constitute a clearly unwarranted invasion of personal privacy. For these reasons, the Court DENIES summary judgment concerning the eyewitness names, initials and identification numbers in these records.

Defendants also redacted names of FBI agents involved in the investigation of the crash of Flight 800. (That was not an issue in the Second CIA Motion.) Are privacy rights in the names of FBI agents different than those in the names of eyewitnesses? "FBI agents have a legitimate interest in keeping private matters that could conceivably subject them to annoyance or harassment." *Hunt v. Fed. Bureau of Investigation*, 972 F.2d 286, 288 (9th

Cir. 1992). Exemption 7(C) is often invoked when agents are involved in criminal or quasi-criminal investigations. *See, e.g., Cleary v. Fed. Bureau of Investigation*, 811 F.2d 421, 423-24 (8th Cir. 1987); *Coleman v. Fed. Bureau of Investigation*, 13 F. Supp. 2d 75, 80 (D.D.C. 1998). The identity of the target or defendant in a criminal investigation is the key factor in whether agents are likely to be harassed or annoyed if their names are disclosed. For instance, in *Cleary*, the court concluded that exposing agents to harassment by persons carrying grudges were sufficient reasons to avoid disclosure, although it also noted that these privacy interests might be outweighed if the public interest in disclosure is greater. 811 F.2d at 424. Here, the investigation ultimately concluded that there was no criminal wrongdoing. There being no aggrieved "target" or defendant, the Court finds it unlikely that the FBI agents will be subjected to harassment or annoyance. Furthermore, without revealing other contact information, such as addresses or phone numbers, it is less likely, ten years later, that "revealing their names will engender an avalanche of inquiries to these officials." *See Gordon v. Fed. Bureau of Investigation*, 388 F. Supp. 2d 1028, 1044 (N.D. Cal. 2005). In *Gordon,* plaintiffs argued that government redactions of Transportation Security Agency employees' names under Exemptions 6 and 7(C) were improper. The court found that the Government's creation and maintenance of travel watch-lists were part of government policy-making, and that "[k]nowing who is making government policy with respect to the watch lists is relevant to understanding how the government operates." *Gordon*, 388 F. Supp. 2d at 1041 (emphasis in original). The same could be said here. The FBI agents were integrally involved in developing the information that the government points to for its ultimate conclusion regarding the probable cause of Flight 800's crash. Similarly, when the reliability of an investigation's methodology is in doubt, investigators have less of a right to be sheltered from public scrutiny. *Castaneda v. United States*, 757.F.2d 101, 1012 (9th Cir. 1985).

Moreover, because Plaintiff has alleged that "responsible officials acted negligently or otherwise improperly in the performance of their duties," the agents' privacy interest is diminished. *Favish*, 541 U.S. at 174; *see SafeCard Servs. v. Sec. & Exch. Comm'n*, 926 F.2d 1197, 1205-06 (DC. Cir. 1991) (access to name which might confirm or refute evidence of agency impropriety increases public interest); *Neely v. Fed. Bureau of Investigation*, 208 F.3d 461, 464 (4th Cir. 2000) (with allegations of agency impropriety, release of names would help supplement public understanding of the agency's activities).

The Court concludes that the release of the names of FBI agents could not reasonably be expected to constitute an unwarranted invasion of their privacy. Therefore, the Court DENIES summary judgment concerning the agents' names found in these records.

b. Exemption 3 (CIA Redactions): Plaintiff's Records 9 and 23

Defendants describe Plaintiff's Record 9,[18] dated April 15, 1997, as an "[i]nternal email noting that one FBI agent thinks the accuracy of the clock [aboard] TWA Flight 800 maybe problematic." *First Buroker Decl.*, at p. 68. It is one page in length and the sender and recipients, all CIA employees, are redacted in the released copy. Plaintiff challenges the redactions of the name of the author of this email, which is found in redactions 1 and 5.

The Court already addressed this issue in its previous Summary Judgment Order, and adopts its reasoning and conclusion here. *See* ____ F.Supp. 2d ____, 2006 WL 2789870 at *9, 10. The CIA is exempted from disclosing the names of its employees. 50 U.S.C.A. § 403g; *see Minter v. Central Intelligence Agency* 88 F.3d 796, 801 (9th Cir. 1996) (material within the purview of section 403g may be withheld under Exemption 3). Once it is determined the CIA has statutory authority to withhold the document, the information is categorically exempt. *Id.* Therefore, for this reason, the Court GRANTS summary judgment concerning the redactions found in Plaintiffs Record 9.

Defendants describe Plaintiff's Record 23[19] as "[m]ultiple analyst notes (handwritten) including mathematical calculations and reflecting daily work and consultations with other analysts, regarding aerodynamics." *First Buroker Decl.*, at p. 44. It contains multiple dates in November and December 1997, is six pages long, and contains redactions under Exemptions 3, 5, 6 and 7(C). Plaintiff contests only the singular redaction premised on Exemption 3, found on the third page of the record. This redaction apparently is the "acronym of a CIA component" *Second Buroker Decl.*, at ¶ 11. The CIA component acronym falls within Defendants' redaction on the same page based on Exemption 5, which is unopposed (as are the redactions under Exemptions 6 and 7(C)). For that reason, the Court GRANTS summary judgment concerning the redactions found in Plaintiff's Record 23.

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[18] Plaintiff's Record 9 is also identified by MORI Document ID # 1215015.

[19] Plaintiff's Record 23 is also identified by Document Index # 1147334 and MORI Document ID # 1176344.

Plaintiff argues that Exemption 3 cannot apply to the name of a certain CIA employee whose name has appeared in a *Washington Times* article referring to an intelligence medal he supposedly won for his work on the crash. If information has been "'officially acknowledged,' its disclosure may be compelled even over an agency's otherwise valid exemption claim." *Fitzgibbon v. Cent. Inteiigence Agency*, 911 F.2d 755, 765 (D.C. Cir. 1990) (citation omitted). For an item to be "officially acknowledged," however, the information requested must be as specific as the information previously released, it must match the information previously disclosed, and it must already have been made public through an official and documented disclosure. *Id.* (citation omitted).

Defendants have not waived their right to invoke Exemption 3 to withhold this individual's name. The "once-secret" report identified in the *Washington Times* article is not among the documents responsive to Plaintiff's FOIA request. *Second Buroker Decl.*, at ¶ 9. Conversely, none of the records from which the CIA withheld names of CIA personnel have been previously released to the public. *Id.*

c. Exemption 4 (Confidential Commercial Information): Plaintiff's Records 13, 27, 28, 29, 32, 45, 46, 56, 59 and 70

This exemption was analyzed in the August 31,2006 Order. __Supp2d ___), 2006 WL 2789870 at *1044.

To assist in the crash investigation, Boeing voluntarily provided information to the CIA and NTSB. *Breuhaus Decl.*, at ¶ 3. This material apparently relates to "baseline mass properties, aerodynamic and engine characteristics of the Boeing Model 747-100 aircraft." *First Buroker Decl.*, at ¶ 35. Boeing claims this information is confidential and proprietary and has detailed the "substantial competitive harm" that disclosure allegedly would cause. *Id. See generally Breuhaus Decl.* Furthermore, Boeing claims that in the future it would "be forced to reconsider" providing information such as this if it has to be disclosed in this case. *Second Breuhaus Decl.*, at ¶ 14.

In ten records, the CIA and NTSB redacted allegedly proprietary Boeing information, under Exemption 4. Defendants describe Plaintiff's Record 13,[20] dated May 12, 1997, as an "[i]nternal email providing information relating to several points to be addressed in the CIA video." *First Buroker Decl.*, at p. 69. It is one page in length. Redaction 4, made under Exemption 4, apparently redacts information that refers to the pitch angle of the aircraft that Boeing "gets."

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[20] Plaintiff's Record 13 is also identified by MORI Document ID # 1215017.

Defendants describe Plaintiff's Record 27,[21] dated March 3, 1998, as a"[d]raft report containing analysis and preliminary conclusions regarding further assessment of TWA Flight 800." *Id.* at p. 57. This eighteen-page document, entitled "Dynamic Flight Simulation," was completely withheld under Exemptions 4 and 5.

Plaintiffs Record 28, discussed above, is a seventeen-page record concerning radar tracking.

Defendants describe Plaintiffs Record 29,[22] with pages containing various dates in 1998 as well as multiple undated pages, as "[various charts, extract of draft report, and notes regarding radar data, which contain or reflect preliminary conclusions re analysis of TWA Flight 800, i.e. [sic], subset of data and preliminary analysis of draft report." *Id.* at p. 58. The record is twenty-two pages long and was withheld in full. Plaintiff challenges the redactions under Exemption 4 (as well as Exemption 5).

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[21] Plaintiff's Record 27 is also identified by MORI Document ID # 1215195. This record also contains other contested redactions which are addressed in the next section of this Order.

[22] Plaintiffs Record 29 is also identified by MORI Document ID # 1215196.

Defendants describe Plaintiffs Record 32[23] as a "[p]rint out containing trajectory simulation program setup and data." *Id.* at p. 62. It is titled "MVS Trajectory Program 2D Study" and is twenty-eight pages long. The first page of the record has writing that says "3/98" and also "3)15/04." None of the data in the printout is redacted, but two sections of handwritten information on the first page are redacted under Exemptions 3 and 4, respectively. Plaintiff challenges only the Exemption 4 redaction.

Defendants describe Plaintiffs Record 45[24] as an "[e]mail conveying trajectory simulation program input, 'best estimate' re certain radar data plots, and resulting charts depicting certain aspects of flight simulation." *Id.* at p. 60. It is fifteen pages long and undated. Plaintiff challenges redactions 4 through 6, made under Exemption 4. These redactions are found on pages 2, 4 and 5 of the document. This record also contains contested redactions under Exemption 5 which are addressed in the next section of this Order.

Defendants describe Plaintiff's Record 46[25] as "[m]ultiple graphs conveying technical data." *Id.* at p. 63. The single page document is titled "Free Response to Mass Prop and Aero Change Variation due to

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[23] Plaintiff's Record 32 is also identified by MORI Document ID # 1215202.

[24] Plaintiff's Record 45 is also identified by MORI Document ID # 1215200.

[25] Plaintiff's Record 46 is also identified by MORI Document ID # 1215209.

Thrust," and is marked "Preliminary #1." This record was withheld in full based upon Exemption 4.

Defendants describe Plaintiff's Record 56,[26] dated March 25, 1997, as two sets of graphs and charts depicting left and pitching moment coefficients of Boeing Model 747 aircraft. *Moye Decl.*, at p. 338. The four-pages long record is dated March 24, 1997. It was created by Boeing, *Id.* at ¶ 54, and was withheld in full. Boeing claims that a "competent engineer with access to the hypothetical configuration represented in the graphs and tables. . . could determine the baseline lift coefficient and pitching moment coefficient for the Boeing Model 747-100 aircraft." *First Breuhaus Aff,* at ¶ 8. Plaintiff challenges Defendants' withholding of this record based on Exemption 4.

Defendants describe Plaintiffs Record 59,[27] dated April 4, 1997, as three graphs and two charts depicting lift, pitching moment, and drag coefficients of the Boeing Model 747 aircraft, *Moye Decl.*, at p. 356. The record was created by Boeing. *Id.*, at ¶ 54. It is five pages long and was withheld in full based on Exemption 4. The charts and graphs compare the baseline coefficients with those for an aircraft minus its forward body. Boeing claims that a "competent engineer with access to the hypothetical configuration represented in the graphs and tables... could determine the baseline lift coefficient, pitching moment coefficient, and drag coefficient for the

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[26] Plaintiff's Record 56 is also identified as NTSB Record 6.

[27] Plaintiff's Record 59 is also identified as NTSB Record 8.

Boeing Model 747-100 aircraft." *First Breuhaus Aff,* at ¶ 11. Plaintiff challenges Defendants' withholding of this record based on Exemption 4.

Finally, Defendants describe Plaintiff's Record 70[28] as a "[c]omputer program written by NTSB staff to simulate the flight path of aircraft" *Moye Decl.* at p. 41. It is undated and found in electronic form only. [29] Defendants withheld this program in full under Exemption 4 because it incorporated engine thrust and draft, lift and pitching moment coefficient data provided by Boeing. *Id.* at p. 419. The program apparently cannot operate without this data; as such, Defendants claim it is not segregable. *Id.* Plaintiff challenges Defendants' withholding of this record.

As they did in the Second CIA Motion, Defendants argue that under the *Natiora1 Parks* test, release of this information likely would impair the government's ability to obtain comparable information in the future, and that the disclosure of this information would cause Boeing substantial competitive harm. Defendants rely primarily on the Affidavits and Declarations of Richard S. Breuhaus (Chief Engineer of Air Investigation Safety for Boeing) as well as the

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[28] Plaintiffs Record 70 is also identified as NTSB Record 15. This record also contains contested redactions under Exemption 5 which are addressed in the next section of this Order.

[29] In response to the Court's order for *in camera* submission of the NTSB records, Defendants submitted "five pages of the main-body simulation executable," which they state are "representative of Record 15." This printout appears to consist of data matrices in binary code and would undoubtedly be incomprehensible to anyone lacking computer, technical or scientific expertise.

Declarations of Melba Moye (Chief of the NTSB's FOIA branch) and its attached *Vaughn* index record descriptions, the Declarations of Terry N. Buroker (the CIA's Information Review Officer, in the Directorate of Intelligence) and the Declarations of Dennis Crider (the NTSB engineer intimately involved in the Flight 800 investigation). The Court discussed several of these materials, such as the Breuhaus Declarations arid the First Buroker Declaration, in its previous order, along with the September 8, 2005 Hoffstadt Affidavit, on which Plaintiff relies. *See* _____F. Supp. 2d _____, 2006 WL 2789870 at *17. The declarations and affidavits the Court previously considered Contain information that overlaps the additional declarations and affidavits described just above. In fact, some of the testimony is repeated word-for-word from one declaration to another.

For the reasons set forth in the previous Summary Judgment Order *Id.*, the Court finds that there is a factual dispute as to whether Boeing will suffer substantial competitive harm and Defendants have not proffered evidence sufficient to meet their burden to show that release of this information likely would impair the government's ability to obtain comparable necessary information in the future. Therefore, the Court DENIES summary judgment concerning the contested uses of Exemption 4 in each of these ten records.

c. Exemption 5 (Deliberative Process Privilege): Plaintiff's Records 27, 28, 29, 43, 70 and 74

Defendants withheld six records in whole or in part based upon the deliberative process privilege and Exemption 5. The Court reviewed these records *in camera*. Although each record must be analyzed separately, Plaintiff argues that none of them was predecisional, because they were all generated following the broadcast of the CIA animation on November 17, 1997, which, Plaintiff argues, constituted a final agency report. Defendants respond that the CIA's final conclusion concerning what these eyewitnesses saw occurred after the records at issue here were generated. The CIA did obtain additional data after that broadcast and it continued to refine its analysis, although the additional data did not change the CIA's ultimate conclusion concerning what eyewitnesses saw. Nor was any report explicitly characterized as "final" subsequently issued. *Id.*

Exemption 5 distinguishes "between predecisional memoranda prepared in order to assist an agency decisionmaker in arriving at his decision, which are exempt from disclosure, and postdecisional memoranda setting forth the reasons for an agency decision already made, which are not." *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168,184 (1975). Thus, a record is predecisional if an agency can identify' a specific decision to which it is predecisional. *Maricopa. Audubon Soc'y v. United States Forest Serv*., 108 F.3d 1089, 1094 (9th . 1997).

The Court agrees with Plaintiff that the CIA animation was a final disposition of that agency.

However, just because it was a final disposition does not mean it was the only final disposition. The CIA could have published some sort of addendum stating it had received and considered new data arid that it had (or had not) changed its ultimate conclusion. Although this is not what occurred, it also is not what was required. Defendants have presented uncontroverted evidence that the CIA analyzed new data that led it to reach a conclusion. That the later conclusion was no different than the previous one does not preclude it from being "final" for purposes of FOIA. Therefore, the Court finds that so long as the records in question predate the CIA's second conclusion concerning what eyewitnesses saw (which incorporated new data provided by the NTSB), they may properly be considered "predecisional" (if they otherwise qualify for that status).

The Court will now describe and analyze each record.

i. Plaintiff's Record 27

Plaintiff's Record 27, discussed above, is an eighteen-page "[d]raft report containing analysis and preliminary conclusions" concerning the crash. It is entitled "Dynamic Flight Simulation." *First Buroker Decl.*, at p. 57. It is dated March 3, 1998. It was withheld in full based upon the deliberative process privilege.

The handwritten edits and the language used by the author of Record 27 demonstrate that it was written prior to the final agency decision, and Plaintiff presents no evidence to the contrary. Therefore, the Court finds that this record is predecisional.

Record 27 also is deliberative, in that its disclosure would expose the CIA's "decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions."

Assembly of the State of California v. United States Dep't. of Commerce 968 F.2d, 916, 921 (9th Cir. 1992) (*en banc*), as amended on *denial of reh'g* (Sept. t, 1992). The text confirms that the document was prepared "in order to assist an agency decisionmaker in arriving at his decision." *Maricopa,* 108 F.3d at 1093. The language, context, and handwritten edits in the record support that it was deliberative in nature. The document explains the steps CIA analysts took in calculating the flight simulation, particular challenges they faced, which data and other information they found important, shortcomings of their analysis to that point, and recommendations for the ultimate decision-makers.

Record 27 is not segregable, except to very limited extent that its title, date and the bolded titles may be released. The entire text of the document otherwise encompasses the deliberative process of its author(s). The Court therefore GRANTS summary judgment as to the remainder of Record 27, including its text, graphs and handwritten notes.

ii. Plaintiff's Record 28

Plaintiff's Record 28, also discussed above, is a seventeen-page "[d]raft report concerning preliminary analysis and conclusions regarding radar tracking" and is entitled, appropriately, "Analysis of Radar Tracking." *Id.* at p. 56. It is dated March 17, 1998.

Defendants withheld this record in full based upon the deliberative process privilege.

Record 28 contains both text and graphs. Handwriting on the first page states "draft" arid "shown to NTSB but never finalized." The "never finalized" notation and the language in the text support that it was written prior to the final agency decision, and Plaintiff presents no evidence to the contrary. Therefore, Record 28 is predecisional. It also is deliberative. It contains conclusions and thoughts of CIA analysts concerning the viability and accuracy of certain radar data, the application of such data in determining the flight path of Flight 800, the problems with certain data and the thought processes of individuals who analyzed the data. As a whole, the text of this document shows that it was prepared "in order to assist an agency decisionmaker in arriving at his decision." *Maricopa*, 108 F.3d at 1093. Disclosure would expose the CIA's "decisionmaking process in such a way to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions." *Assembly*, 968 F.2d at 921.

As with Record 27, the Court finds that Plaintiff's Record 28 is not segregable, except to the very limited extent of its title, date, the bolded titles of each section of the memorandum, Figure 1 (on page 3 of the record) along with its accompanying notation, and the entirety of the Appendix.[30] Release of those portions of Record 28 would neither discourage candid discussions among agency personnel nor undermine the agency's ability to perform its functions. To that extent only, the Court DENIES summary judgment as to Plaintiff's Record 28, but GRANTS summary judgment as to the remainder of Record 28, including its text and additional graphs.

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[30] The data found in the Appendix is not deliberative for the same reasons as it was not in Plaintiff's Records 66 and 78 in the First Summary Judgment Order.____ F. Supp. 2d ____, 2006 WL 2789870 at *23-25. See Plaintiff's Record 74, below.

iii. Plaintiff's Record 43

Plaintiffs Record 43, also discussed above, is a five-page undated "[d]raft with handwritten annotations reflecting candid discussion and opinion. . . regarding CIA analysis of eyewitness reports" about the crash. *Id.* at p. 65. It is entitled "An Overview of the C.I.A.'s Analysis of Witness Statements in the TWA Flight 800 Investigation." The cover page preceding the overview is described as a "Response to allegations of SA [Name] regarding C.I.A. analysis." Many comments and edits appear on each of the five pages, in different handwritings. The shaded word "draft" appears across the entirety of the four pages of text. Defendants withheld this record in full based upon the deliberative process privilege.

Notwithstanding the uncertainty as to the date(s) of its creation, Record 43 appears to be predecisional and almost certainly is deliberative. It contains assessments of the CIA's analysis of witness statements during the investigation. Handwritten comments unquestionably are part of a give-and-take exchange. The Court GRANTS summary judgment to defendants as to this Exemption.

iv. Plaintiff's Record 74

Defendants describe Plaintiff's Record 74[31] as a "[t]able tracking the action in the ocean of debris from TWA flight 800." *Id.* at p. 483. The undated record, which was withheld in full, "consists of fifteen pages of data... that were collected, collated and prepared or edited by NTSB staff in order to track and categorize the latitude, longitude, description and comments concerning pieces of debris from TWA flight 800 located in the ocean." *Id.* Defendants state that this data "provided a starting point and confirmation for the sequencing, as measured by the location of the debris, of events that occurred during the crash," and that the sequence ultimately developed from this data was used in the creation of simulations included in Addendum II. *Id.* Defendants state this data was preliminary in nature and subject to confirmation and correction. *Id.* at p. 484. Record 74 also contains handwritten comments, opinions and speculations of investigators. *Id.*

Moye declared that the data in this document was collated in anticipation of and ultimately used in the creation of Addendum II. *Id.* at p. 483. The Court finds that, although the document itself is undated, Defendants have shown that this record is preliminary in nature.

Defendants maintain that the act of collecting and organizing data regarding the position of ocean debris is deliberative. The Court cannot agree. For the reasons set forth in the previous Summary Judgment

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[31] Plaintiffs Record 74 is also identified as NTSB Record 27.

Order, especially as applied to Plaintiff's Records 66 and 78, the Court finds that the NTSB's selection and organization of factual data concerning debris recovery, without more, is not deliberative.

This determination is not the end of the Court's inquiry, however. Record 74 contains seven columns in addition to the numerous handwritten notes and comments. Six of these columns - all but the "Comments" column -- contain raw information that does not reflect or reveal mental processes of the NTSB investigators. However, having reviewed the document *in camera,* the Court concludes that the information found under the column entitled "Comments, well as the handwritten notes found in the record, are deliberative; they evaluate and analyze the facts contained in the other columns. Disclosure of the "Comments" column and the handwritten annotations "would expose [the NTSB's] decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions." *Assembly,* 968 F.2d at 921 (quotation omitted).

FOIA requires that a reasonably segregable portion of a record shall be provided following deletion of the portions which are exempt. 50 U.S.C.A. § 552(b). Although the NTSB may not withhold the entirety of Record 74 simply because it contains some exempt material, that material is not "inextricably intertwined" with the non-exempt portions. *See Mead Data Central,* 556 F.2d at 260. Therefore, the Court GRANTS N PART AND DENIES IN PART Defendants' use of Exemption 5 to withhold Plaintiff's

Record 74. Only the Comments column and the handwritten notes may be withheld.

v. Plaintiff's Record 29

Plaintiff's Record 29, discussed earlier, consists of twenty-two pages of charts, draft reports and notes regarding radar data that allegedly "contain or reflect preliminary conclusions" concerning the crash, according to Defendant's *Vaughn* index. Having reviewed this record *in camera*, the Court does not adopt the government's description.

Record 29 appears to consist of several sets of papers that apparently were assembled as one file. The first three pages contain the date March 17 1998, in handwriting, and consist of graphs of azimuth and elevation from a specified location. The fourth page appears to be a printout of an execution from a computer file. It is dated January 6, 1998, and contains what appears to be several data entries expressed in numeric form. The fifth page contains two formatted graphs, one concerning altitude and one radar range. It is undated. Almost all the remaining seventeen pages consist of undated graphs of various data (with the exception of one graph dated January 14, 1998). For example, one graph depicts radar tracing by various local radar sites and the flight path of the aircraft. Another page shows the radar locations of four sites mapped by latitude and longitude.

Defendants submit two conclusory statements in. support of their argument that this record is preliminary. *See First Buroker Decl.*, at p. 58; *Second Buroker Decl.*, at ¶ 17. If those pages that contain dates between January and March 1998 were created at those times, that would be during the period when the CIA reviewed and incorporated "new" NTSB data into its analysis, and that would be consistent with Defendants' characterization. However, these charts are not deliberative, despite Defendants' conclusory statements to the contrary.

Defendants claim that these graphs and charts contain "intra-agency and inter-agency deliberations with NTSB, including analyst's selection of variables, assumptions, calculations and graphical representations. . ." *See First Buroker Decl.*, at p. 58; *Second Buroker Decl.*, at ¶ 17. I do not agree. This record contains at most, graphical representations of factual data. If any deliberation concerning the manipulation of such data occurred, it could only be about how to represent the data in this manner. Therefore, for the reasons set forth in the previous Summary Judgment Order from pages 42 through 49, especially as it applies to Plaintiff's Record 76, *See* F. Supp. 2d —, 2006 WL 2789870 at *25, I find that these graphical representations of factual data concerning debris recovery are not deliberative. I therefore DENY Defendants' use of Exemption 5 and the deliberative process privilege to withhold Plaintiff's Record 29.

vi. Plaintiff's Record 70

Plaintiff's Record 70, (NTSB Record 15) also discussed above, is a computer program written to simulate the flight path of Flight 800, and available only in electronic form. *Moye Decl.*, at p. 416. This program was withheld in full based upon the deliberative process privilege.

Dennis Crider, an NTSB employee, developed a flight simulation software program prior to joining the NTSB. *Cridèr Decl.*, at ¶ 9; *Moye Decl.*, at 416, While at the NTSB, Crider further developed and used the simulation program in several accident investigations, including that of Flight 800. *Crider Decl.*, at ¶ 9; *Moye Decl.*, at p. 416.

There is no standardization for simulation code, and the program was never intended for public use, so it was written in a format intuitive to Crider.[32] *Crider Decl.*, at ¶ 8. At the time of the Flight 800 investigation, there were no instructions or guides for using the program except for limited comments written by Crider. *Id.* (Defendants do not explain the comments.) The program itself uses mathematical models[33] that describe the forces acting on the specific aircraft type at issue to derive the motion resulting from these forces. *Id.* The mathematical formulations necessary for the simulation program are written in computer code, and according to Crider are not segregable. *Id.*

One of Crider's assignments during the investigation of Flight 800 was to determine the flight path of the aircraft after it lost its forward fuselage. *Moye Decl.*, at p. 416. Crider modified his program for this task. *Crider Decl.*, at ¶ 19; *Moye Decl.*, at p. 416. NTSB management reviewed and commented on his work after the initial simulation was complete. *Crider Decl.*, at ¶ 19. Crider explained that, over time, he continued to exercise his own judgment in determining whether the program was operating as designed and whether it was representing and using data appropriately. He modified the program and the simulation as necessary, such as when new data became available. *Id.* at ¶ 20-21, 23-24.

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[32] Program is written in C++, with portions written in C. *Crider Decl.*, at ¶ 9.

[33] Some of these mathematical models contain information the government claims is proprietary to Boeing. *Moye Decl.*, at p. 417.

To run a specific simulation, the program needs such information as the starting condition (airspeed, position, altitude, etc.), specific configuration the flight (such as flap setting and landing gear position), the aircraft's weight and center of gravity, and some basis for guiding the aircraft. *Crider Decl.*, at ¶ 11-12; *Moye Decl.*, at p. 418. The program

may be adjusted and adapted to analyze differing versions of aerodynamic data and physical attributes of aircraft.[34] *Id.* at p. 421. The flight data recorder and radar data provided much of this information for Flight 800. *Id.* at p. 418.

Defendants claim this program was used to provide information the NTSB used in determining the probable cause of the crash of Flight 800 and the safety recommendations that followed. They claim that an understanding of the flight path following the separation of the plane's nose was expected to aid the NTSB in understanding the causes of the crash. *Id.* at pp. 421-22. Defendants argue that Crider used the program to pursue different possibilities related to the flight path of Flight 800. *Id.* at p. 422. Crider considers his simulation to be a tool to do so. *Supp. Crider Decl.*, at ¶ 5. The source code of the simulation used by Crider is no longer available, as it has been updated and improved over time. *Id.* at ¶ 5. Therefore, the only "simulation software" maintained as a record is the executable file, which consists of binary machine language (Os and 1s).[35] *Id.*

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[34] Even so, though, the record at issue is simply a fixed iteration consisting of the program at a certain time, *not* a series of programs that might reveal how they changed as Crider refined them.

Crider explains that, over time, he would run simulations using his program and the data inputs would be changed between each run to attempt to make the simulation results "best represent the action of the aircraft as reflected by the radar data." *Id.* at ¶¶ 8-9. Crider claims this is a "deliberative, analytical process in which staff must be free to adjust and experiment without fear that staff work at whatever stage will be released and compared to the Safety Board's ultimate conclusions..." *Id.* at 10.

Plaintiff does not challenge that this record is predecisional, and the Court finds that it is. However, the Court does not agree with Defendants that Content of the simulation program, as opposed to that of the input or output files, is deliberative.

First, although Crider clearly utilized some judgment in selecting "relevant" data he needed for his simulation program, *see Crider Decl.*, at ¶11 18, 23-24, the selection of some data from a larger set does not, alone, amount to a deliberative process under Exemption 5. *See* First Summary Judgment Order, — F. Supp. 2d —, 2006 WL 2789870 at * 14, 23. Instead, the government must show that the deliberative process can be determined from the selection of the data alone. *Carter v. United States Dep't of Commerce*, 307 F.3d 1084, 1091 (9th Cir. 2002). Defendants present no evidence to this end.

---

[35] Crider did retain the last control system source file and aerodynamics source file specific to Flight 800. *Supp. Crider Decl.*, at ¶ 6. However, these do not appear to be a part of Plaintiff Record 70, but rather two separate responsive records.

Second, Crider explains that he "performed all of the calculations and made all of the necessary adjustments to the computer program to simulate the flight path of TWA flight 800 for the NTSB." *Crider Decl.*, at ¶f 19, 24. Although Crider may have used his "engineering knowledge and professional judgment" in making these decisions, *see Id.* at ¶ 20, there is no evidence that, by reviewing the disclosed source file, a reader would be able to understand or reconstruct the NTSB 's deliberative process. *See Assembly*, 968 F.2d at 922-23.

Finally, Crider states that management reviewed and commented on his work after the initial simulation was completed. *See Crider Decl.*, at ¶ 19. However, there is no allegation, much less evidence, that disclosure of this program would disclose the content of that review and content. Indeed, generally speaking, Crider does not claim that the disclosure of the program would "expose an agency's decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions."[36] *See Assembly,* 968 F.2d at 921 (quotation omitted). His simulation program was merely a to be used in connection with other data to derive a result based upon that data. Defendants have failed to carry their burden that what has been withheld "represent[ed] the mental processes of the agency in considering alternative courses of action prior to settling on a final plan." *Nat'l Wildlife Fed'n,* 861 F.2d at 1122. Therefore, I DENY Defendants' use of Exemption 5 and the deliberative process privilege to withhold this record.

III. Conclusion

For the foregoing reasons, the Court GRANTS summary judgment as to Plaintiff's Records 9, 23, 27 (in part), 28 (in part), 43 and 74 (in part). For Records 27 and 28, Defendants shall produce the title, date, bolded sub-titles and (in the case of Record 28) Figure 1 and the Appendix. For Record 74, Defendants shall produce everything but the "Comments" column and the handwritten notes. The Court DENIES Defendants' summary judgment motions as to all the other disputed Records.

Not later than ten days from the date of this Order the parties shall lodge a stipulated "[Proposed] Judgment" reflecting this Court's rulings on all three summary judgment motions. By stipulating to the terms of the "[Proposed] Judgment," neither side shall waive his or its right to challenge those rulings on appeal. If the parties fail to stipulate to such a

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[36] Conversely, Crider does make such a claim concerning the release of the input and output files-used in connection to this simulation program. *Supp. Crider Decl.*, at ¶ 10.

"[Proposed] Judgment," the Court may sanction monetarily any party or lawyer whose position was unreasonable.

IT IS SO ORDERED.

DATED: October 4, 2006

/s/
A. Howard Matz
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Date: March 19, 2007
Case No. CV 03-8023 (RZx)
Title H. RAY LAHR v. NATIONAL TRANSPORTATION SAFETY BOARD, *et al.*

Present: The Honorable A. HOWARD MATZ, U.S. DISTRICT JUDGE

Stephen Montes Not Reported
Deputy Clerk / Court
Reporter

Attorneys NOT Attorneys NOT
Present for Plaintiffs Present for
Defendants

Proceedings: IN CHAMBERS (No Proceedings Held)

I. INTRODUCTION

On November 16, 2006, Plaintiff H. Ray Lahr ("Plaintiff") moved for an award of attorneys' fees and costs under the Freedom of Information Act ("FOIA"), based on 5U.S.C. § 552(a)(4)(E).[1] That statute provides that "[t]he court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed." The Court must examine Plaintiffs eligibility for the award, his entitlement to the award, and the reasonableness of the amount he requests. *Long* v. *United States Internal Revenue Serv.,* 932 F.2d 1309, 1311 (9th Cir. 1991). Defendants argue that Plaintiff is not entitled to such an award because his prosecution has not bestowed any benefit on the public and because a reasonable basis existed in law for them to withhold the material that the court ordered be turned over. Defendants further argue that the amount Plaintiff requests should be reduced, because it includes time that is non-compensable and unjustifiable hourly rates. For the reasons that follow, the Court GRANTS Plaintiffs motion for attorneys' fees and costs, albeit in an amount lower than what Plaintiff requested.

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[1] Dkt. No. 121.

II. ANALYSIS

A. Eligibility for the Award

A plaintiff in a FOIA action is eligible for an award of attorneys' fees and costs if the plaintiff has "been awarded some relief by a court, either in a judgment on the merits or in a court-ordered consent decree." *Davy* v. *C.I.A.,* 456 F2.d 162, 165 (D.C. Cir. 2006) (internal citations omitted). Defendants do not argue that Plaintiff is not *eligible* for (as opposed to *entitled* to) an award. In the Court's August 31, 2006 and October 4, 2006 orders, the Court ordered 26 of the 32 contested records requested by Plaintiff. As a result, the Court finds that Plaintiff has "substantially prevailed" and is thus eligible for an award of attorneys' fees and costs.

B. Entitlement to the Award

In deciding whether Plaintiff is entitled to an award of attorneys' fees and costs, "the district court must consider four criteria: (1) the public benefit from disclosure, (2) any commercial benefit to the plaintiff resulting from disclosure, (3) the nature of the plaintiffs interest in the disclosed records, and (4) whether the government's withholding of the records had a reasonable basis in law." *Long* v. *United States Internal Revenue Serv.,* 932 F.2d 1309, 1313 (9th Cir. 1991) (internal citations omitted). "These four criteria are not exhaustive, however, and the court may take into consideration whatever factors it deems relevant in determining whether an award of attorney's fees is appropriate." *Id.* (internal citations omitted).

In *Church of Scientology of California* v. *United States Postal Service,* the Ninth Circuit provided guidelines illustrating how courts should apply these four factors to determine entitlement. 700 F.2d 486, 492-95 (9th Cir. 1983) (remanding to the district court to determine whether plaintiff had substantially prevailed and whether attorneys' fees should be awarded) [hereinafter *Church of Scientology]*. The Ninth Circuit advised that "the criteria listed in the Senate Judiciary Committee's Report on the Freedom of Information Act [hereinafter "Report"] should be considered in conjunction with the existing body of law on the award of attorney's fees." *Church of Scientology,* 700 F.2d at 492. *Church of Scientology* then discussed various cases to illustrate the application of each of the factors.

1. Public Benefit

The Report suggested that under this criterion, "a court would ordinarily award fees, for example, where a newsman was seeking information to be used in a publication or a public interest group was seeking information to further a project benefitting the general public, but it would not award fees if a business was using the FOIA to obtain data relating to a competitor or as a substitute for discovery in private litigation with the government." *Id.* at 492 n.6. *Church of Scientology* discussed *Blue* v. *Bureau of Prisons,* a Fifth Circuit case in which the court "stressed that in weighing the public benefit factor the district court should take into account the degree of dissemination and the likely public interest that might result from disclosure." *Id.* at 493 (analyzing *Blue* v. *Bureau of Prisons,* 570 F.2d 529, 533-34 (5th Cir. 1978)). *Blue* explained that the public benefit factor "speaks for an award where the complainant's victory is likely to add to the fund of information that citizens may use in making vital political choices." *Blue,* 570 F.2d at 533-34.

Church of Scientology also discussed *Goldstein* v. *Levi,* in which the district court found a public benefit in a suit by a producer for a public television station to procure FBI files concerning statements made during the investigations of the Rosenberg espionage case. *Id.* (analyzing *Goldstein* v. *Levi,* 415 F. Supp. 303, 305 (D.D.C. 1976). *Church of Scientology* also instructed that "[w]hile obtaining a favorable legal ruling, standing alone, does not establish the public benefit criterion, the district court may take into consideration the fact that the plaintiff has so prevailed when determining entitlement to attorney's fees." *Id.*

In the Court's first (August 31, 2006) Order, the Court stated that "the public interest in ferreting out the truth [about the explosion of TWA Flight 800] would be compelling indeed." *Lahr* v. *Nat'l Transp. Safety Bd.,* 453 F.Supp.2d 1153, 1167 (C.D. Cal. 2006); Aug. 31 Order, 12. Defendants dispute whether any of the records released in this action actually succeeded in "ferreting out the truth" or in supporting the Plaintiff's theory that the crash of TWA 800 resulted from an errant missile strike. (Opp'n, 7:7-8:12). Defendants are plainly incorrect. Although this Court explicitly refrained from making a finding either affirming or repudiating the official government conclusion, the records Plaintiff succeeded in establishing a right to obtain do indisputably shed light on that question.

Plaintiff provides ample evidence of the public's interest in the information obtained in this case. According to Plaintiff, TWA Flight 800 has already been the subject of nine books and over 2,000 newspaper articles. A Google search yields over 147,000 web page hits. Plaintiff adds that well-qualified experts will analyze the disclosures and several will publish reports of their findings on the websites of Flight 800 Independent Researcher's Organization (at flight800.org) and the Association of Retired Airline Professionals (at www.twa800.com). At least two magazines have already published articles about this Court's ruling. See Reply, page 5. Plaintiff has gone to great lengths to disseminate the records at issue in this case.

Plaintiff states that his website [http://raylahr.entryhost.com/updates.htm] "displays almost all of the records he received from the various agencies - over 1,500 pages." The website also allegedly includes "the case docket sheet, linked to significant filings, the CIA and NTSB animations, three unofficial animations, videotaped statements of four eyewitnesses, seven experts, and three members of the probe - all of which were lodged in this case."

The Court finds that Plaintiff has satisfied the "public benefit" prong.

2. Commercial Benefit

Plaintiff acknowledges that he "has no 'commercial interest in the documents within the meaning of that term as used by the FOIA." This factor is inapplicable.

3. Nature of Plaintiff's Interest

The Report states that under this factor, "a court would generally award fees if the complainant's interest in the information sought was scholarly or journalistic or public interest oriented, but would not do so if his interest was of a frivolous or purely commercial nature." *Church of Scientology,* 700 F.2d at 492 n.6. Plaintiff is a distinguished former pilot with an abiding interest in flight safety and aerodynamics. As previously described, the information released either has or will lead to scholarly analysis of TWA Flight 800. Defendants offer no opposition to Plaintiffs argument that this factor weighs in his favor.

4. Reasonable Basis in Law

The Report states that under this factor, "a court would not award fees where the government's withholding had a colorable basis in law but would ordinarily award them if the withholding appeared to be merely to avoid embarrassment or to frustrate the requester." *Church of Scientology,* 700 F.2d at 492 n.6. In *Cotton* v. *Heyman,* the D.C. Circuit reiterated that the government "need only have 'a colorable basis in law' for the court to consider the 'reasonable basis in law' factor in determining a FOIA plaintiff's entitlement to attorney's fees." 63 F.3d 1115, 1121 (D.C. Cir. 1995) (internal citations omitted). The D.C. Circuit explained that "what is required is a showing that the government had a reasonable basis in law for [its position] and that it had not been recalcitrant in its opposition to a valid claim or otherwise engaged in obdurate behavior." *Cuneo* v. *Rumsfeld,* 553 F.2d 1360, 1366 (D.C. Cir. 1977).

Plaintiff argues that the CIA's first response to the request for records did not have a colorable basis in law. In its January 26, 2001 FOIA response letter, the CIA wrote, "[w]e have researched this matter, and have learned that the pertinent data, and resulting conclusions, were provided by the National Transportation Board (NTSB). CIA simply incorporated the NTSB conclusions into our videotape." (Mot., 7:9-12) (citing June 16, 2004 Lahr Affidavit, Ex. 16). That was not correct.

In construing Defendants' deliberative process privilege and Exemption 5 contentions, the Court ordered them to produce information that was not predecisional or that was purely factual and thus non-deliberative. Defendants, however, point out that the Court also upheld their withholding of some materials. That some material may have been withheld properly does not preclude a finding that the withholding of other records lacked a reasonable basis in law.

As to exemptions 6 and 7(C), Defendants did not offer any evidence to rebut Plaintiffs challenges to their privacy assertions. Defendants argue that they had no obligation to so respond, because the Supreme Court has held that "where there is a privacy interest protected by Exemption 7(C) and the public interest being asserted is to show that responsible officials acted negligently or otherwise improperly in the performance of their duties, the requester must establish more than a bare suspicion in order to obtain disclosure." *Nat'l Archives & Records Admin.* v. *Favish,* 541 U.S. 157, 174 (2004). Defendants argue that Plaintiff failed to establish more than a "bare suspicion," but the Court found that "the public interest in uncovering agency malfeasance and wrongdoing outweighs [Defendants' claimed privacy interest]." *Lahr v. Nat 'l Safety Bd.,* 453 F.Supp.2d at 1185; Aug. 31 Order, 42.

The material at issue regarding Exemption 4, concerning confidential commercial information, was technical intonation Boeing provided to the government. The Court found that the withheld information is publicly available and that Defendants had failed to show a likelihood of substantial competitive harm. *Id.* at 1182; Aug. 31 Order, 37. Defendants argue that their withholding had a colorable basis in law, because the Court stated there was "a factual dispute as to whether Boeing [would] suffer substantial competitive harm" if the information was released. *Lahr* v. *Nat'l Transp. Safety Bd.,* 2006 WL 2854314 at *18 (C.D. Cal. 2006); Oct. 5, 2006 Order, 33. But in that order and in the earlier order (453 F.Supp.2d at 1182), the Court found that Defendants failed to meet their burdens to justify withholding.

C. Reasonableness of the Amount Requested

Plaintiff initially sought $175,532 in attorneys' fees and $2,232 in costs, for a total of $177,864. The fees were based on a calculation of 654 hours time expended by John H. Clarke and 150 hours by a then-law student/clerk named Thomas Leffler. Mr. Clarke "charged" (for purposes of Plaintiffs motion) $250.00 per hour. For Mr. Leffler the "charge" was $80.00 per hour.

After Defendants filed their opposition papers, Plaintiff conceded that they had raised certain meritorious objections and agreed to reduce the fees by $10,956. Specifically, Plaintiff acknowledged, in principle, the impropriety of receiving fees for efforts to prove that the CIA acted in bad faith, a contention not upheld by this Court, and for efforts opposing the CIA's successful motion for a stay. Plaintiff also conceded that Mr. Clarke's "hourly rate" for 2002 and 2003 should be $220. But Plaintiff then added another $2,750 for the time Mr. Clarke spent in preparing the Reply Papers. So with attorney's fees in the revised amount of $169,658 and costs in the amount of$2,232, Plaintiff now seeks a total of $171,890. The Court awards $144,210 in fees and $2,232 in costs. This award includes compensation for preparing the reply brief. The award is based upon the Court's personal knowledge of this case, the substance of the pleadings, the Court's prior orders and opinions, and its strong sense of what this case fundamentally was about. *See, The Traditional Cat Assn.* v. *Gilbreath,* 340 F.3d 829, 834 (9th Cir. 2003). The ruling is based upon the following findings, factors and considerations.

1. General Principles

It is unnecessary for the Court to reiterate the standard principles governing this motion, given that the parties themselves have cited many of the applicable cases. In general, the Court follows *Hensley* v. *Eckerhart,* 461 U.S. 424, 103 S.Ct. 1933 (1983); *Kerr* v. *Screen Extras Guild,* 526 F.2d 67 (9th Cir. 1975), *cert. denied,* 425 U.S. 951, 96 S.Ct. 1726 (1976); *Blum* v. *Stenson,* 465 U.S. 886 (1984) and *Ketchum* v. *Moses,* 24 Cal. 4th 1122 (2001). The Court has reviewed, but does not have to carefully scrutinize, all the entries of the timekeepers. *See Evans* v. *Evanston,* 941 F.2d 473, 476 (7th Clr. *1991), cert. denied* 112 S.Ct. 3028 (1992).

2. Reasonableness of Hours for Which Plaintiff Seeks Recovery

Plaintiff has the burden of proving that he is entitled to recover the amounts he seeks. *Johnson* v. *Georgia Highway Express, Inc.,* 488 F.2d 714 (5th Cir. 1974). Compensation is not appropriate for work that was excessive, redundant or otherwise unnecessary. *Hensley* v. *Eckerhart,* supra, at 433-34. The customary method for determining the reasonableness of attorneys' fees is known as the lodestar method. *Morales* v. *San Rafael,* 96 FJd

359,363 (9th Cir. 1996). According to the "lodestar" method, "[t]he most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation, multiplied by a reasonable hourly rate." *Hensley,* 461 U.S. at 433, 103 S.Ct. at 1939. The Court may adjust the "presumptively reasonable" lodestar figure based on the factors delineated in *Kerr* v. *Screen Extras Guild, Inc.,* 526 F.2d 67, 69-70 (9th Cir. 1975), if any were not already subsumed in the lodestar calculation.[2] *Morales,* 96 F.3d at 363. The Court, however, is not necessarily required to consider every factor, but only those in dispute and necessary to support the reasonableness of the award. *Cairns* v. *Franklin Mint Co.,* 292 F.3d 1139, 1158 (9th Cir. 2002).

The Court finds that to a certain extent, Plaintiffs counsel's efforts *were* excessive and unnecessary. As just one example, and as the Court previously noted both in court and in its orders, the attorneys for *both* sides in this case created immense difficulty for the Court by affixing "multiple and confusing identifications to given documents" (453 F. Supp. 2d at 1161, n. 1). As a result, their papers were sometimes close to impossible to evaluate; one couldn't match up their respective positions or even be sure which items they were addressing. A substantial portion of the responsibility for that bewildering mess was attributable to Plaintiffs counsel, whose very enumeration of the FOIA requests also was unnecessarily repetitious and confusing. In court, moreover, Mr. Clarke sometimes was unable to explain his position succinctly or responsively. So at least part of the time Mr. Clarke devoted to this case was excessive. The Court finds that a fair and appropriate reduction is 15 percent. With the 15% reduction in the compensable hours, it is unnecessary to make itemized revisions.

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[2] Factors that are built into the reasonable hours component or the reasonable rate component include "(1) the novelty and complexity of the issues, (2) the special skill and experience of counsel, (3) the quality of representation, ... (4) the results obtained.' *Morales,* 96 F.3d at 364, n.9, quoting *Cabrales v, County a/Los Angeles,* 864 F. 2d 1454, 1464 (9th Cir. 1988); *see also Yahoo! v. Net Games. Inc.,* 329 F. Supp. 2d 1179, 1182 (N.D. Cal. 2004) (considering the contingent nature of a fee agreement as a factor deemed subsumed in the initial lodestar calculation).

In reaching these conclusions, the Court specifically notes the following:

- Plaintiff is not precluded from recovering for hours devoted to preparing affidavits in CV 02-08708 ARM (RZx). That case was dismissed without prejudice in light of the 2003 amendment adding the CIA as a party defendant. But those affidavits became part of the record in this case and the Court incorporated them, or considered them, in rendering its decisions.

- The same conclusion applies to recovery for hours expended in drafting papers in papers in opposition to the NTSB's initial summary judgment motion.

- The Court would not credit Plaintiff for hours devoted to Mr. Schulz's affidavits; Mr. Clarke's Reply Declaration contains no sworn statement even touching upon that contention.

3. Reasonableness of Hourly Rates

> "To inform and assist the Court in the exercise of its discretion, the burden is on the fee applicant to produce satisfactory evidence -- in addition to the attorney's own affidavits -- that the requested rates are those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation."

Blum v. *Stenson,* 465 U.S. 886, 896, n.11, 104 S.Ct. 1541, 1547 (1984) (noting that courts properly require prevailing attorneys to justify the reasonableness of the requested rate or rates).

The parties dispute whether Mr. Clarke really commanded hourly rates of $220-$250. Mr. Clarke maintained an unconventional practice, to be sure, and although his efforts on behalf of clients challenging so called "federal executive branch corruption" are commendable - - his zealous advocacy on behalf of Captain Lahr is particularly noteworthy - - one is forced to conclude that the basis for establishing as "reasonable" the rates he is "charging" is not overwhelming. (Certainly, Mr. Dale's unilluminating declaration is hardly strong evidence.) On the other hand, for the years 2003-2006, an hourly rate of $220/$250 is unquestionably modest, especially by Los Angeles standards. And Mr. Clarke does have fairly lengthy and varied litigation experience. Furthermore, the Court refuses to penalize him for maintaining the kind of practice he has had.

In summary, the Court finds that the hourly rates for which Mr. Clarke seeks compensation are not unreasonable. The same applies to Mr. Leffler's $80.00 hourly rate. The work he performed, some of which may be classifiable as clerical, was necessary and consistent with this Court's requirements.

4. Costs

The Court awards the full $2,232 in costs.

III. CONCLUSION

For the foregoing reasons, the Court awards $144,210 in fees and $2,232 in costs to Plaintiff, for a total of $146,442.

No hearing is necessary. Fed. R. Civ. P. 78; L.R. 7-15.

THIS ORDER IS NOT INTENDED FOR PUBLICATION.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
JAN 21
2010

)
H. RAY LAHR,) No. 06-56717
)
Plaintiff - Appellee,) D.C. No. CV-
) 03-08023-
) AHM
v.) Central
) District
) of California,
NATIONAL TRANSPORTATION) Los Angeles
SAFETY BOARD; CENTRAL)
INTELLIGENCE AGENCY;)
NATIONAL SECURITY AGENCY,) ORDER
)
Defendants - Appellants.)
)

)
H. RAY LAHR,) No. 06-56732
)
Plaintiff – Appellant,) D.C. No. CV-
) 03-08023-
) AHM
v.) Central
) District
) of California,
NATIONAL TRANSPORTATION) Los Angeles
SAFETY BOARD; CENTRAL)

INTELLIGENCE AGENCY;)
NATIONAL SECURITY AGENCY,) ORDER
)
Defendants - Appellees.)
)

)
H. RAY LAHR,) No. 07-55709
)
Plaintiff – Appellant,) D.C. No. CV-
) 03-08023-
) AHM
v.) Central
) District
) of California,
NATIONAL TRANSPORTATION) Los Angeles
SAFETY BOARD; CENTRAL)
INTELLIGENCE AGENCY;)
NATIONAL SECURITY AGENCY,) ORDER
)
Defendants - Appellants.)
)

Before: WARDLAW and BERZON, Circuit Judges, and MINER,* Senior Circuit Judge.

The panel unanimously has voted to deny Plaintiff's petition for rehearing en banc. Judge Wardlaw and Judge Berzon have voted to deny the petition for rehearing en banc. Judge Miner recommends denial of the petition for rehearing en banc.

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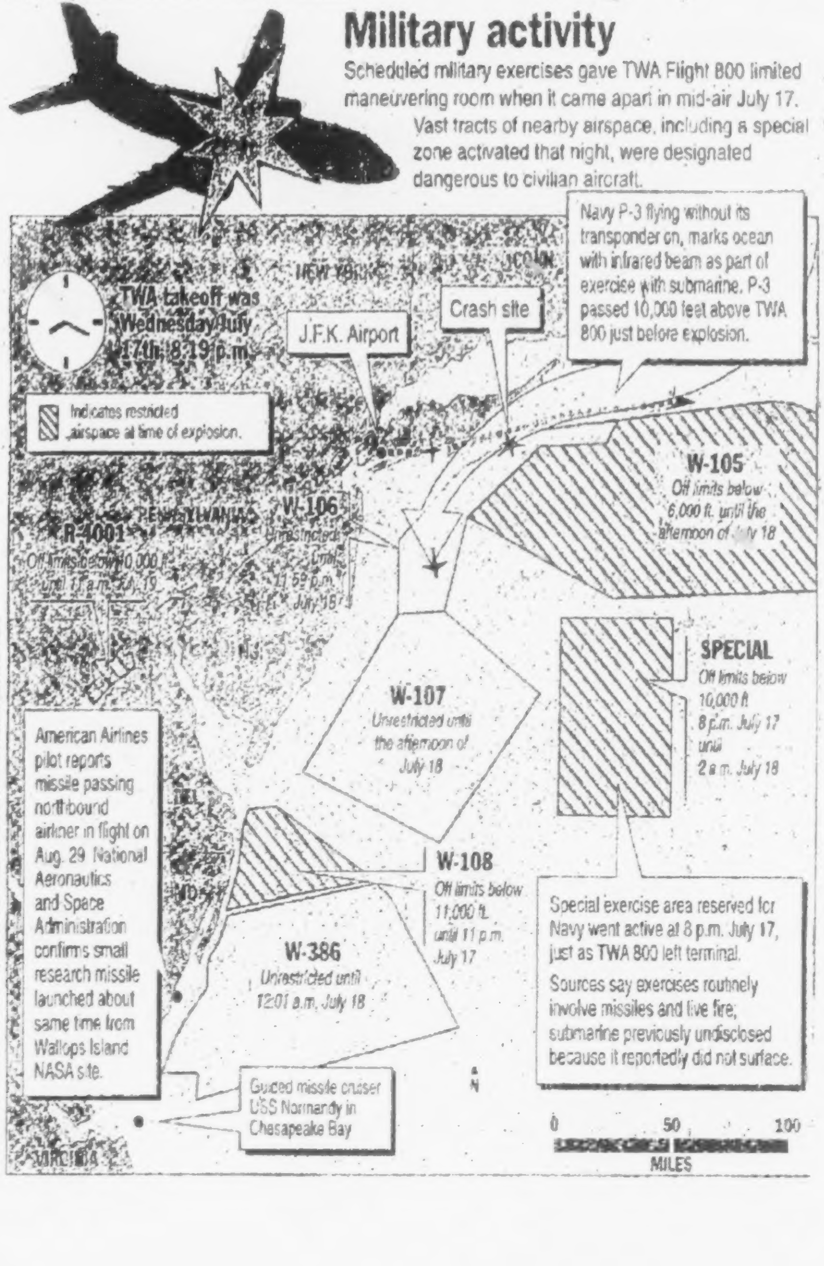
* The Honorable Roger J. Miner, Senior United States Circuit Judge for the Second Circuit, sitting by designation.

The full court has been advised of the petitions for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is DENIED. No further petitions for rehearing or rehearing en banc may be filed.

Reprinted from March 10, 1997 *Press Enterprise* Newspaper article, *New Data Show Missile May Have Nailed TWA 800, Debris Pattern Provides Key to Mystery* (II # 28 Ex 12 *Lahr Aff.* at 381)



Military activity

Scheduled military exercises gave TWA Flight 800 limited maneuvering room when it came apart in mid-air July 17. Vast tracts of nearby airspace, including a special zone activated that night, were designated dangerous to civilian aircraft.

Navy P-3 flying without its transponder on, marks ocean with infrared beam as part of exercise with submarine. P-3 passed 10,000 feet above TWA 800 just before explosion.

TWA takeoff was Wednesday July 17th, 8:19 p.m.

▨ Indicates restricted airspace at time of explosion.

American Airlines pilot reports missile passing northbound airliner in flight on Aug. 29. National Aeronautics and Space Administration confirms small research missile launched about same time from Wallops Island NASA site.

Guided missile cruiser USS Normandy in Chesapeake Bay

Special exercise area reserved for Navy went active at 8 p.m. July 17, just as TWA 800 left terminal.

Sources say exercises routinely involve missiles and live fire; submarine previously undisclosed because it reportedly did not surface.

NEW YORK
CONN.
J.F.K. Airport
Crash site
W-105
Off limits below 6,000 ft. until the afternoon of July 18
PENNSYLVANIA
W-106
Unrestricted until 11:59 p.m. July 18
R-4001
Off limits below 10,000 ft. until 11 a.m. July 19
N.J.
W-107
Unrestricted until the afternoon of July 18
SPECIAL
Off limits below 10,000 ft 8 p.m. July 17 until 2 a.m. July 18
DEL.
MD.
W-108
Off limits below 11,000 ft. until 11 p.m. July 17
W-386
Unrestricted until 12:01 a.m. July 18
N
VIRGINIA
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MILES

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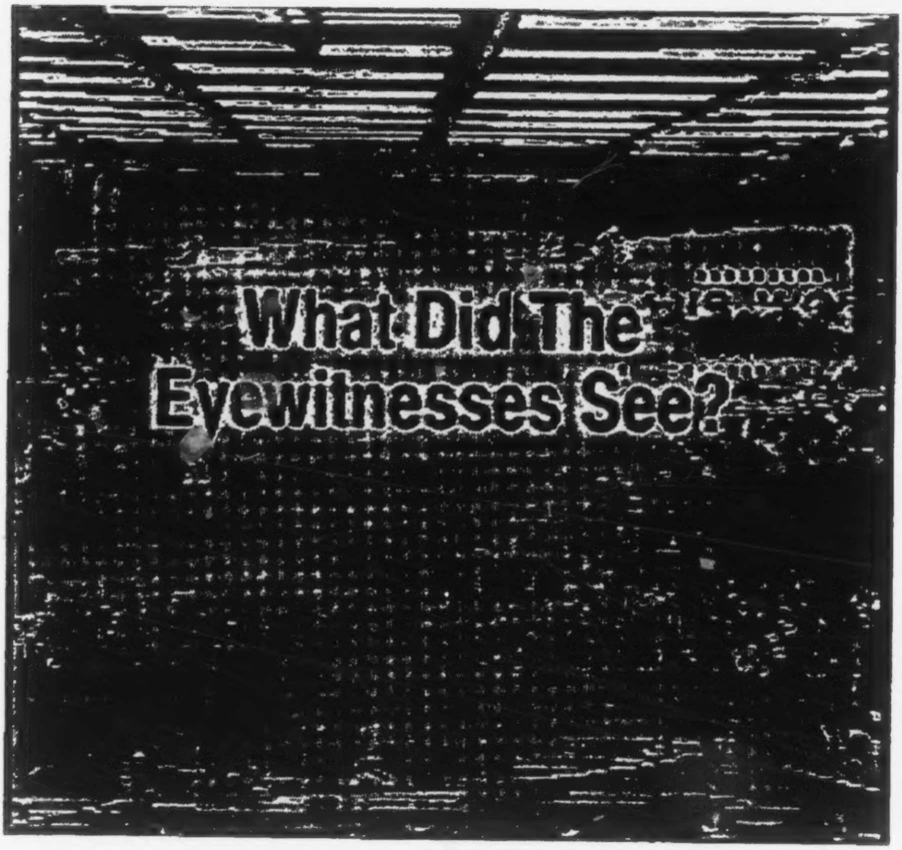
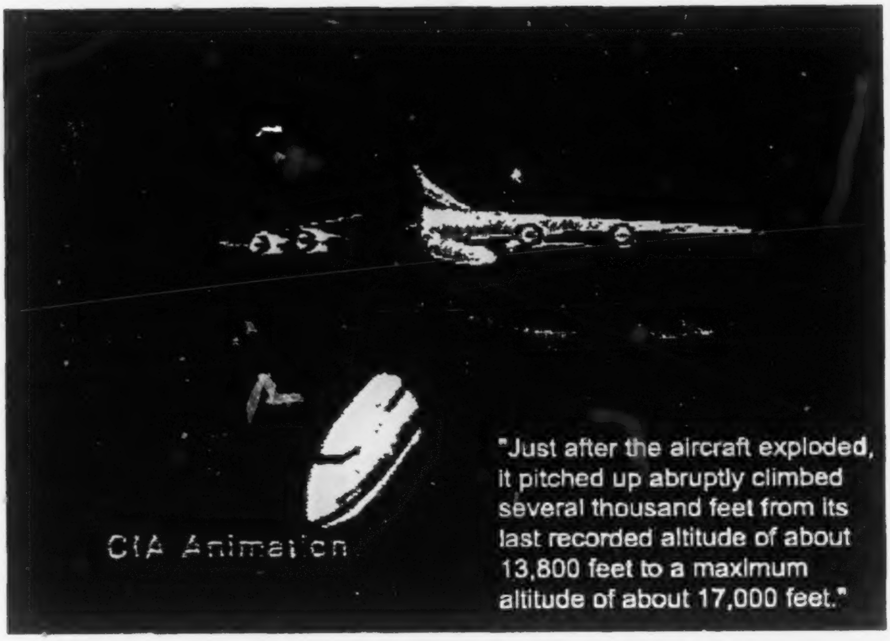


What Did The
Eyewitnesses See?

The Eyewitnesses
Did Not See A Missile

Not A Missile
CIA Animation



"Just after the aircraft exploded, it pitched up abruptly climbed several thousand feet from its last recorded altitude of about 13,800 feet to a maximum altitude of about 17,000 feet."

THE WASHINGTON TIMES

Tuesday, August 15, 2000 / PAGE A5

Advertisement Advertisement Advertisement

Hundreds Of Eyewitnesses Know the FBI and CIA Lied!

WE WANT THE NATIONAL TRANSPORTATION SAFETY BOARD TO TELL THE TRUTH

WE SAW TWA FLIGHT 800 SHOT DOWN BY MISSILES

AND WE WON'T BE SILENCED ANY LONGER

We are some of the hundreds of eyewitnesses to the crash of TWA Flight 800 that killed 230 people off the coast of Long Island on July 17, 1996.

We are OURTAGED that the FBI would not let a single one of us testify at the NTSB's public hearing in December 1997 when it heard testimony on what may have happened to the plane. The FBI feared that our testimony would undermine the video produced by the CIA that was shown on national television to persuade viewers that we all mistook the plane's burning fuel for a missile. They want you to believe that a fuel tank explosion caused the crash. Their Herculean efforts failed to find the necessary ignition source.

We are INCENSED that for nearly four years the FBI refused to release its hundreds of reports of interviews with eyewitnesses who told them what we saw – the plane being hit by missiles that broke off its nose, blew up the fuel tank and sent the plane plummeting into the sea.

And we are SHOCKED at the lengths to which the FBI, the CIA and the NTSB have all gone to discredit and ignore our testimony in order to hide the truth.

HERE ARE A FEW OF THE HUNDREDS OF OUR STATEMENTS THE FBI CONCEALED

EYEWITNESS Michael Wire, described by the CIA as a key eyewitness, saw what he at first thought was a "cheap firework" ascending from behind a house near the beach, arching over, speeding out to sea, and culminating in an explosion so powerful that it shoot a 70-ton bridge on which he was standing.

EYEWITNESS Dwight Brumley, an excellent witness according to the CIA, was in a plane going north when he noticed a fast moving light at a lower altitude also going north. Its flight ended with two explosions a short distance ahead. He said another passenger told him he had seen the cabin lights of eastbound TWA 800 before the explosions.

EYEWITNESS Richard Goss was on the porch of Westhampton Yacht Club gazing over the ocean. He saw what he thought was a firework going straight up. It was very bright, almost pink. It arched over and went south out to sea, but it then made a sharp left turn. Two explosions followed, the second more to the east and larger, like something broke off and caught fire.

EYEWITNESS Paul Angelides, an engineer, from the deck of his beach house saw a red glowing object quite high in the sky. At first it moved slowly, leaving a short white smoke trail, but it picked up speed, streaking out to sea. He lost sight of it when it was about 10 degrees above the horizon. He then saw a series of flashes followed by a fireball falling into the ocean. He heard a prolonged boom like thunder followed by three loud bursts of sound, the last so strong that it shook his house.

EYEWITNESS Maj. Frederick Meyer was in an Air National Guard helicopter when he saw a streak of light 10 or 15 miles away for 3 to 5 seconds. He lost it for about a second, and then further to the left he saw two bright white explosions, which he identified as ordnance, followed by a fuel explosion that was bright orange.

EYEWITNESS William Gallagher was on his boat facing east 10 to 12 miles west of TWA 800 when he saw what looked like a red flare heading into the sky from the horizon from his right to his left, meaning that it was going toward the shore. He said it became a "big white ball of light, from which two orange streaks emerged." "One went down and the other arched up a little before coming down," he said.

EYEWITNESS #649 was in Westhampton when he noticed an object from behind the trees in front of him. It was bright white with a reddish pink aura, rising vertically at moderate speed. It then veered southwest, out to sea, appearing to slow and "wiggle." It then speeded up. He noticed it was going toward what appeared to be a stationary glittering object higher in the sky. It looked like it would miss that object, but in less than a second he saw a white flash followed by another farther east, and two objects arching upward, trailing smoke that turned into large balls of fire.

Think Of It!

The FBI got hundreds of accounts like these. Instead of giving them credence, it had the CIA produce a video to discredit them all.

The claim that there is no physical evidence to support the eyewitness accounts is a lie!

It took an ordnance explosion near the plane to break off the nose of the plane, blowing the nose-wheel gear door INWARD, shredding the tires and wrecking the cockpit.

FBI agents have been observed altering some evidence in the hangar and causing other evidence to disappear. They have even altered the debris field, locating key parts of the plane miles away from where they were actually found.

Admiral Thomas H. Moorer, former Chairman of the Joint Chiefs of Staff, has said, "All the evidence would point to a missile."

America Must Know The Truth

On August 22-23 the NTSB will meet to review and approve its final report on what caused the crash of TWA Flight 800. There is no doubt that this board will be under heavy pressure to say the initiating event was a fuel tank explosion even though there is not a shred of evidence to support it.

We, the eyewitnesses know that missiles were involved. We don't know who launched them, but we know that for some reason our government has lied and tried to discredit all of us to keep that question from being addressed.

America must be told the truth about what really happened on the night of July 17, 1996, causing the deaths of 230 people. The claim that our evidence is worthless is false and we want to know who is behind it. Hundreds of us SAW what happened.

The FBI, the CIA and the NTSB must not be allowed to get away with this cover-up by defamation of the eyewitnesses. We appeal to those who know why this is being done to share their information with us. Confidentiality is guaranteed.

We Will Not Be Silenced!

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